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MINNESOTA REPORTS

VOL. 77

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

JUNE 12, 1899—NOVEMBER 1, 1899

HENRY BURLEIGH WENZELL

REPORTER

ST. PAUL
FRANK P. DUFRESNE
1900

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SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE
PEOPLE OF SAID STATE

Rec. Oct. 30, 1900.

JUSTICES
OF THE
SUPREME COURT
OF MINNESOTA

DURING THE TIME OF THESE REPORTS

HON. CHARLES M. START, CHIEF JUSTICE.
HON. WILLIAM MITCHELL.
HON. LOREN W. COLLINS.
HON. DANIEL BUCK.
HON. THOMAS CANTY.

DARIUS F. REESE, Esq., Clerk.

ATTORNEY GENERAL,
HON. WALLACE B. DOUGLAS.

NOTE

By Laws 1895, c. 23, the reporter is required to report all cases argued and determined in the court.

By the practice of the court, based on G. S. 1894, § 4826, the headnote in each case is prepared by the judge writing the opinion.

The cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in (). Of the cases in this volume, those preceding the case on page 402 are from the April, 1899, term calendar, and the remaining cases are from the October, 1899, term calendar,

As required by Laws 1895, c. 23, the names of counsel are followed by their official designation, as subscribed by them to their respective briefs.

In citations from the first twenty volumes of the Minnesota reports the page of the original edition is given, preceded by the corresponding page of the edition prepared by Chief Justice Gilfillan.

CASES REPORTED.

	Page		Page
A			
Ætna Ins. Co. of Hartford, (Doten v.).....	474	Surety Co. of New York v.)	92
Alexander v. City of Duluth	445	Boyle v. Musser.....	153
American Surety Co. of New York v. Board of Commrs. of Waseca County.....	92	Boyle v. Musser-Sauntry Land, Logging & Mnfg. Co.	206
American Surety Co. of New York v. Nelson.....	402	Brennan Lumber Co. v. Great Northern Ry. Co....	360
Anderson, (Scheibel v.)....	54	Broadbent, (National Fire Ins. Co. of Hartford v.)...	175
Anderson, (Schneider v.)...	124	Brown v. Fischer.....	1
Aultman Co. v. Mosloski...	27	Burhans, (McQueen v.)....	382
B			
Backus (E. W.) Lumber Co., (Bennett v.).....	198	Burns, (Lanpher v.).....	407
Bailey v. Strachan.....	526	C	
Barnes (W. A.) & Co., (Jo- annin-Hansen Co. v.)....	428	Cargill (W. W.) Co., (State ex rel. Railroad and Ware- house Commission v.).....	223
Barrows, (New Hampshire Savings Bank v.).....	138	Carlin, (Davis v.).....	472
Barry, (State v.).....	128	C. C. Washburn Flouring Mills Co., (Langworthy v.)	256
Baxter v. Covenant Mutual Life Assn.....	80	Chamber of Commerce of Minneapolis, (State ex rel. Crane v.).....	308
Beatty v. Howe Lumber Co.	272	Chapel, (Hull v.).....	159
Bennett v. E. W. Backus Lumber Co.....	198	Chicago, M. & St. P. Ry. Co., (Emery v.).....	465
Benz v. City of St. Paul....	375	Chicago, M. & St. P. Ry. Co., (King v.)	104
Berryhill v. Peabody.....	59	Christian v. Klein.....	116
Blien v. Rand.....	110	City of Duluth, (Alexander v.)	445
Board of Commrs. of Bel- trami County, (First Nat. Bank of Detroit v.).....	43	City of Minneapolis, (Kelly v.)	76
Board of Commrs. of Wa- seca County, (American			

	Page		Page
City of St. Paul, (Benz v.)...	375	Emery v. Chicago, M. & St. P. Ry. Co.....	465
City of St. Paul, (Lumber- men's Ins. Co. v.).....	410	Erlandson, (Swenson v.)....	189
City of St. Paul, (Merchants' Realty Co. v.).....	343	E. W. Backus Lumber Co., (Bennett v.).....	198
City of Winona, (Tarras v.)	57		
Colburn, (Richardson v.)...	412	F	
Coleman v. Retail Lumber- men's Ins. Assn.....	31	First Nat. Bank of Detroit v. Board of Commrs. of Beltrami County.....	43
Columbia Nat. Bank, (Fors- ter v.).....	119	First Nat. Bank of Minneap- olis, (Selover v.).....	140
Cooney, (State v.).....	518	Fischer, (Brown v.).....	1
Coughlan v. Longini.....	514	Fonda v. St. Paul City Ry. Co.	336
Covenant Mutual Life Assn., (Baxter v.).....	80	Forster v. Columbia Nat. Bank	119
Currie v. Mendenhall.....	179	Friedman v. Muggli.....	243
Cutting v. Weber.....	53		
D		G	
Davis v. Carlin.....	472	Gagne v. Minneapolis Street Ry. Co.....	171
Devlin v. James McMillan & Co.	137	Gaines v. Trengrove.....	349
Dexter, (Schenk v.).....	15	Gehr v. Knight.....	88
District Court of Meeker County, (State ex rel. Min- neapolis T. M. Co. v.)....	302	George, (Northwestern Mut. Life Ins. Co. v.).....	319
District Court of Ramsey County, (State ex rel. Gotzian v.).....	248	Gibson, (London & North- west American Mortgage Co. v.)	394
District Court of Watonwan County, (State ex rel. Lar- son v.).....	405	Great Northern Ry. Co., (Brennan Lumber Co. v.)..	360
Doten v. Ætna Ins. Co. of Hartford	474	Great Northern Ry. Co., (Harding v.)	417
Duluth & Iron Range R. Co., (State v.).....	433	Gylstrom, (State ex rel. Douglas v.)	355
Duluth Trust Co., (Vent v.)	523		
E		H	
Eaton, (McCune v.).....	404	Hall v. United States Fidel- ity & Guaranty Co.....	24
		Hanson v. Ingwaldson.....	533

	Page		Page
Hanson v. Swenson.....	70	L	
Harding v. Great Northern Ry. Co.	417	Langworthy v. C. C. Wash- burn Flouring Mills Co... 256	
Harriott v. Holmes.....	245	Lanpher v. Burns.....	407
Hausler, (Webber v.).....	48	Lawrence, (National G. A. Bank of St. Paul v.).....	282
Heimbach, (Zenith Building & Loan Assn. v.).....	97	Leland v. School Dist. No. 28 ...	469
Hoerr v. Meihofer.....	228	Lewis (Robert P.) Co., (State v.	317
Holmes, (Harriott v.).....	245	Lidgerding v. Zignego.....	421
Howe Lumber Co., (Beatty v.)	272	Lindquist, (State v.).....	540
Hoxsie v. Kempton.....	462	London & Northwest Amer- ican Mortgage Co. v. Gib- son.	394
Hubner, (Marquardt v.)....	442	Longini, (Coughlan v.).....	514
Huil v. Chapel.....	159	Lowe (Scheffer v.)	279
I		Lumbermen's Ins. Co. v. City of St. Paul.....	410
Ingwaldson, (Hanson v.)....	533	M	
J		McCune v. Eaton.....	404
James McMillan & Co., (Dev- lin v.)	137	McMillan (James) & Co., (Devlin v.)	137
Joannin-Hansen Co. v. W. A. Barnes & Co.....	428	McQueen v. Burhans.....	382
Johnson, (State v.).....	267	Marquardt v. Hubner.....	442
Johnson, (State ex rel. City of St. Paul v.).....	453	Meehan v. Zeh.....	63
Johnson, (Ueland v.).....	543	Megaarden, (State ex rel. Mohler v.)	483
K		Meihofer, (Hoerr v.).....	228
Kelly v. City of Minneapolis	76	Mendenhall, (Currie v.)....	179
Kempton, (Hoxsie v.).....	462	Mendenhall, (Warren v.)....	145
King v. Chicago, M. & St. P. Ry. Co.	104	Merchants' Realty Co. v. City of St. Paul.....	343
Klein, (Christian v.).....	116	Messenger v. St. Paul City Ry. Co.	34
Kloss v. Sanford.....	510	Minneapolis Cold-Storage Co., (Selser Bros. Co. v.)..	186
Knight, (Gehr v.).....	88	Minneapolis Street Ry. Co., (Gagne v.).....	171
Knight v. Knoblauch.....	8		
Knoblauch, (Knight v.)....	8		
Kray v. Muggli.....	231		

	Page		Page
Minneapolis Terminal Ele.		R	
Co., (Winthrop Nat. Bank		Raid, (Blien v.)	110
of Boston v.)	329	Reem v. St. Paul City Ry.	
Minnesota Type-Foundry Co.,		Co.	503
Strickland v.)	210	Retail Lumbermen's Ins.	
Mosloski, (Aultman Co. v.)	27	Assn., (Coleman v.)	31
Muggli, (Friedman v.)	243	Richardson v. Colburn	412
Muggli, (Kray v.)	231	Robert P. Lewis Co. (State	
Muggli, (Town of Wakefield		v.)	317
v.)	244	Rockford Ins. Co., (Schrep-	
Musser, (Boyle v.)	153	fer v.)	291
Musser-Sauntry Land, Log-		Rogers v. Town of Aitkin	539
ging & Mnfg. Co., (Boyle			
v.)	206	S	
N		St. Paul City Ry. Co.,	
National Fire Ins. Co. of		(Fonda v.)	336
Hartford v. Broadbent	175	St. Paul City Ry. Co., (Mes-	
National G. A. Bank of St.		senger v.)	34
Paul v. Lawrence	282	St. Paul City Ry. Co., (Reem	
Nelson, (American Surety		v.)	503
Co. of New York v.)	402	Sanford, (Kloss v.)	510
New Hampshire Savings		Scheffer v. Lowe	279
Bank v. Barrows	138	Scheibel v. Anderson	54
Newpick, (Sheehan v.)	426	Schenk v. Dexter	15
Nichols & Shepard Co. v.		Schneider v. Anderson	124
Soderquist	509	School Dist. No. 28, (Leland	
Northwestern Mut. Life Ins.		v.)	469
Co. v. George	319	School Dist. No. 47 v. Weise	167
O		Schrepfer v. Rockford Ins.	
Olson v. Pennsylvania &		Co.	291
Ohio Fuel Co.	528	Selover v. First Nat. Bank	
P		of Minneapolis	140
Palmer v. Yorks	20	Selser Bros. Co. v. Minne-	
Peabody, (Berryhill v.)	59	apolis Cold-Storage Co.	186
Pennsylvania & Ohio Fuel		Sheehan v. Newpick	426
Co., (Olson v.)	528	Smith v. Smith	67
Peterson v. Vanderburgh	218	Soderquist, (Nichols & Shep-	
		ard Co. v.)	509
		Southall, (State v.)	296

	Page		Page
State v. Barry.....	128	T	
State v. Cooney.....	518	Tarras v. City of Winona..	57
State v. Duluth & Iron		Tesch, (Wellendorf v.).....	512
Range R. Co.	433	Town of Aitkin, (Rogers v.).	539
State v. Johnson.....	267	Town of Wakefield v. Mug-	
State v. Lindquist.....	540	gli	244
State v. Robert P. Lewis Co.	317	Travelers' Ins. Co. of Hart-	
State v. Southall.....	296	ford v. Walker.....	438
State v. Willard.....	190	Trengrove, (Gaines v.).....	349
State ex rel. Beek v. Wage-		U	
ner	483	Ueland v. Johnson.....	543
State ex rel. City of St. Paul		United States Fidelity &	
v. Johnson	453	Guaranty Co., (Hall v.)...	24
State ex rel. Crane v. Cham-		V	
ber of Commerce of Min-		Vanderburgh, (Peterson v.).	218
neapolis	308	Vent v. Duluth Trust Co....	523
State ex rel. Douglas v.		W	
Gylstrom	355	W. A. Barnes & Co., (Joan-	
State ex rel. Gotzian v. Dis-		nin-Hansen Co. v.).....	428
trict Court of Ramsey		Wagener, (State ex rel.	
County	248	Beek v.)	483
State ex rel. Larson v. Dis-		Walker, (Travelers' Ins. Co.	
trict Court of Watonwan		of Hartford v.).....	438
County	405	Warren v. Mendenhall.....	145
State ex. rel. Minneapolis		Washburn (C. C.) Flouring	
T. M. Co. v. District Court		Mills Co., (Langworthy v.)	256
of Meeker County.....	302	Webber v. Hausler.....	48
State ex rel. Mohler v. Me-		Weber, (Cutting v.).....	53
gaarden	483	Weise, (School Dist. No.	
State ex rel. Railroad and		47 v.)	167
Warehouse Commission v.		Wellendorf v. Tesch.....	512
W. W. Cargill Co.....	223	Willard, (State v.).....	190
Sterling v. Sterling.....	12	Winthrop Nat. Bank of Bos-	
Strachan, (Bailey v.).....	526	ton v. Minneapolis Ter-	
Strickland v. Minnesota		minal Ele. Co.....	329
Type-Foundry Co.	210	W. W. Cargill Co., (State ex	
Swenson v. Erlandson.....	189	rel. Railroad and Ware-	
Swenson, (Hanson v.).....	70	house Commission v.)....	223

	Page		Page
Y		Zenith Building & Loan	
Yorks, (Palmer v.).....	20	Assn. v. Heimbach.....	97
Z		Zignego, (Lidgerding v.)....	421
Zeh, (Meehan v.).....	63		

CASES CITED BY THE COURT.

I. CASES FROM MINNESOTA REPORTS.

	Page		Page
Adamson v. Horton, 42 Minn.	161, 127	Christian v. City of Minneapolis,	
Adamson v. Petersen, 35 Minn.		69 Minn.	530, 203
529,	216, 217	City Loan Co. v. Cheney, 61 Minn.	
Alexander v. City of Duluth, 57		83,	102
Minn. 47,	456, 458, 461	City of Winona v. School District,	
Althen v. Tarbox, 48 Minn. 18,	515	40 Minn. 13,	45
American T. & S. Bank v. Gluck,		Clark v. Butts, 73 Minn. 361,	56
68 Minn. 129,	258	Clarke v. Board of Co. Commrs.,	
Armour Packing Co. v. Brown, 76		66 Minn. 304,	196
Minn. 465,	137	Cobb v. Bord, 40 Minn. 479,	449
Auerbach v. Le Sueur Mill Co.,		Cohen v. Goldberg, 65 Minn. 473,	289
28 Minn. 201,	258	Columbia Electric Co. v. Dixon,	
Baker v. Kelley, 11 Minn. 358		46 Minn. 463,	258
(480),	397	Com. Title Ins. & Trust Co. v.	
Barker v. Kelderhouse, 8 Minn.		Dokko, 72 Minn. 229,	441
178 (207),	216	Conlan v. Grace, 36 Minn. 276,	506
Baxter v. Great Northern Ry. Co.,		Continental Ins. Co. v. Richard-	
73 Minn. 189,	374	son, 69 Minn. 433,	511
Becker v. Dunham, 27 Minn. 32,	217	Cook v. Webb, 19 Minn. 129 (167),	539
Bell v. Dangerfield, 26 Minn. 307,	90	Cortland Wagon Co. v. Sharvy, 52	
Bergen v. Anderson, 62 Minn. 232,	346	Minn. 216,	119
Berger v. Minneapolis Gaslight		Cruikshank v. St. Paul F. & M.	
Co., 60 Minn. 296,	238	Ins. Co., 75 Minn. 266,	442, 443
Berryhill v. Peabody, 72 Minn.		Doud v. Duluth Milling Co., 55	
232,	60	Minn. 53,	276, 277
Bloom v. Moy, 43 Minn. 397,	230, 231	Dunn v. State Bank, 50 Minn.	
Board of Commrs. of St. Louis		221,	263
Co. v. Security Bank of Duluth,		Durment v. Tuttle, 50 Minn. 426,	510
75 Minn. 174,	63	Eddy v. Caldwell, 7 Minn. 166	
Bonham v. Weymouth, 39 Minn.		(225),	126
92,	539	Estes v. Roberts, 63 Minn. 265,	525
Bower v. O'Donnall, 29 Minn. 135,	396	Flanagan v. City of St. Paul, 65	
Bradley v. Norris, 67 Minn. 48,	514	Minn. 347,	343, 346
Brandes v. Carpenter, 68 Minn.		Fletcher v. Neudeck, 30 Minn.	
388,	75	125,	216
Buntin v. Root, 66 Minn. 454,	536	Flowers v. Bartlett, 66 Minn. 213,	306
Butler v. Bohn, 31 Minn. 325,	90	Flynn v. Little Falls E. & W. Co.,	
Byrnes v. Sexton, 62 Minn. 135,	139	74 Minn. 180,	449
Cahill v. Eastman, 18 Minn. 292		Fonda v. St. Paul City Ry. Co.,	
(324),	238	71 Minn. 438,	287, 336
Capital Fire Ins. Co. v. Watson,		Freeman v. Brewster, 70 Minn.	
76 Minn. 387,	27	203,	440, 441
Carpenter v. Comfort, 22 Minn.		Friesenhahn v. Merrill, 52 Minn.	
539,	306	55,	524
Central B. & L. Assn. v. Lamp-		Gowan v. Fountain, 50 Minn. 264,	230
son, 60 Minn. 422,	103	Grant v. Schmidt, 22 Minn. 1,	238

	Page		Page
Hantzch v. Massolt, 61 Minn. 361,	61	Moon v. Northern Pacific R. Co.,	
Hartman v. Welland, 38 Minn.		46 Minn. 106,	531
223,	231	Morrow v. St. Paul City Ry. Co.,	
Hathaway v. Brown, 22 Minn.		74 Minn. 480,	340
214,	342, 343	Murch v. Swensen, 40 Minn. 421,	113
Heberling v. Jaggar, 47 Minn. 70,	127	Nichols v. Walter, 37 Minn. 264,	449
Hennessey v. City of St. Paul, 54		Nickerson v. Wells-Stone Mercan-	
Minn. 219,	397	tile Co., 71 Minn. 230,	22
Hewitt v. Brown, 21 Minn. 163,	248	O'Brien v. Glasow, 72 Minn. 135,	137
Hicks v. Stone, 13 Minn. 398		Olson v. State Bank, 67 Minn.	
(434),	189, 190	267,	115, 263
Hooper v. Henry, 31 Minn. 264,	24	Palmer v. Bank of Zumbrota, 72	
Hunt v. Conrad, 47 Minn. 557,	510	Minn. 266,	263
In re Mann, 32 Minn. 60,	408	Perkins v. Hanson, 71 Minn. 487,	50
In re Van Norman, 41 Minn. 494,	293	Perry v. Miller, 61 Minn. 412, 198,	205
Jesmer v. Rines, 37 Minn. 477,	208	Reitan v. Goebel, 35 Minn. 384,	524
Johnson v. Chicago, M. & St. P.		Ricker v. Butler, 45 Minn. 545,	537
Ry. Co., 31 Minn. 57,	110	Rippe v. Becker, 56 Minn. 100,	494
Johnson v. Howard, 20 Minn. 322		Roberts v. Village of St. James,	
(370),	208	76 Minn. 456,	79, 80
Johnson v. Northwestern Tel.		Robertson v. Rentz, 71 Minn. 489,	50
Exch. Co., 48 Minn. 433,	110	Rochester Ins. Co. v. Martin, 13	
Judd v. Dike, 30 Minn. 380,	63	Minn. 54 (59),	259
Keenan v. Stimson, 32 Minn. 377,	216	Rosemond v. Graham, 54 Minn.	
Kellogg v. Olson, 34 Minn. 103,	216	323,	144
Klipp v. Bullard, 30 Minn. 84,	441	Roussain v. Patten, 46 Minn. 308,	
Knudson v. Curley, 30 Minn. 433,	22		21, 22
Kray v. Muggli, 77 Minn. 231,	244	St. Paul Trust Co. v. Klittson, 62	
Kurtz v. St. Paul & D. R. Co., 65		Minn. 408,	63
Minn. 60,	537	Salko v. St. Paul City Ry. Co.,	
Lancashire Ins. Co. v. Callahan,		67 Minn. 8,	179, 182, 183
68 Minn. 277,	27	Scheibel v. Anderson, 77 Minn.	
Langworthy v. Garding, 74 Minn.		54,	53, 54
325,	257, 259, 264,	Scheible v. Schickler, 63 Minn.	
Lehmann v. Chapel, 70 Minn. 496,	119	471,	517
Leighton v. Grant, 20 Minn. 298		Second Nat. Bank v. Schranck, 43	
(345),	208	Minn. 38,	410
Leonard v. Green, 30 Minn. 496,	285	Security Trust Co. v. Von Hey-	
Levine v. Lancashire Ins. Co., 66		derstaedt, 64 Minn. 409,	
Minn. 138,	33		394, 398, 400
Lundell v. Ahlman, 53 Minn. 57,	515	Selkirk v. Stephens, 72 Minn. 335,	
McGuinness v. School Dist. No. 10,			519, 520, 521
30 Minn. 490,	470	Simon v. Mann, 33 Minn. 412,	408
Maloney v. Flinnegan, 38 Minn.		Simpson v. Stillwater Water Co.,	
70,	21	62 Minn. 444,	238
Marshall & Ilsley Bank v. Cady,		Smalley v. Isaacson, 40 Minn. 450,	
76 Minn. 112,	177, 178		538, 539
Maurin v. Carnes, 71 Minn. 308,	56	Smith v. Anderson, 33 Minn. 25, 43, 44	
Mead v. Randall, 68 Minn. 233,	21, 22	Smith v. Bean, 46 Minn. 138,	409
Mercantile Nat. Bank v. Macfar-		Stadin v. Helin, 76 Minn. 496,	378
lane, 71 Minn. 497,	335	State v. Anderson, 47 Minn. 270,	542
Merchants Nat. Bank v. Stanton,		State v. Chicago, M. & St. P. Ry.	
55 Minn. 211,	325	Co., 38 Minn. 281,	501
Miller v. Condit, 52 Minn. 455,	515	State v. Chicago, M. & St. P. Ry.	
Mitchell v. McFarland, 47 Minn.		Co., 68 Minn. 381,	495
535,	24	State v. City of Lake City, 25	
Mogan v. Carter, 48 Minn. 501,	21	Minn. 404,	45

CASES CITED

xiii

	Page		Page
State v. City of Thief River Falls, 76 Minn. 15,	449	Swing v. H. C. Akeley Lumber Co., 62 Minn. 169,	264
State v. Comings, 54 Minn. 359,	137, 299	Tarras v. City of Winona, 71 Minn. 22.	57
State v. Cooley, 56 Minn. 540, 449,	497	Taylor v. Whitney, 56 Minn. 386,	75
State v. Harris, 50 Minn. 128,	542	Trainor v. Worman, 34 Minn. 237,	465
State v. Henn, 39 Minn. 464,	301	Trull v. Hammond, 71 Minn. 172,	18
State v. Lee, 29 Minn. 445,	542	Vaughan v. McCarthy, 59 Minn. 199,	248
State v. Ludwig, 21 Minn. 202,	542	Vent v. Duluth C. & S. Co., 64 Minn. 307,	524
State v. McFadden, 23 Minn. 40,	43	Voge v. Penney, 74 Minn. 525,	42
State v. Megaarden, 77 Minn. 483,	491	Walton v. Perkins, 28 Minn. 413,	22
State v. Parker, 25 Minn. 215, 43, 44		Wheadon v. Mead, 72 Minn. 372,	216
State v. Rieger, 59 Minn. 151, 133, 134		Williams v. McGrade, 13 Minn. 165 (174),	128
State v. Ritt, 76 Minn. 531,	452	Williams v. Murphy, 21 Minn. 534,	441
State v. Robert P. Lewis Co., 70 Minn. 202,	317, 318	Wilson v. Minneapolis St. Ry. Co., 74 Minn. 436,	339, 340
State v. Robert P. Lewis Co., 72 Minn. 87,	317, 318	Winslow v. Dakota Lumber Co., 32 Minn. 237,	34
State v. Sauer, 42 Minn. 258,	419	Wyman v. Gillett, 54 Minn. 536,	263
State v. Sharp, 27 Minn. 38,	350		
State v. Sheppard, 64 Minn. 287,	152		
State v. Stearns, 72 Minn. 200, 433, 437			

II. OTHER CASES.

	Page		Page
Alban v. Pritchett, 6 Term R.		Hopper v. Barnes, 113 Cal.	636, 425
680,	287	Hussey v. Elrod, 2 Ala.	339, 287
Allen v. De Groodt, 98 Mo. Sup.		Hyde v. Woods, 94 U. S.	523, 315, 316
150,	538	Insurance v. Leslie, 47 Oh. St.	409, 477
Barnwell v. Barnwell, 2 Hill, Eq.		Iowa v. Soper, 39 Iowa,	112, 449
178,	75	Keeler v. Clifford, 165 Ill.	544, 278
Barrett v. Fisch, 76 Iowa,	552,	Kelly v. Small, 2 Esp.	716, 286
Barton v. People, 35 Ill. App.	573, 268	Land v. McIntyre, 100 Wis.	245, 527
Bethel v. Salem, 93 Va.	354, 278	Latrobe v. Mayor, 19 Md.	13, 195
Bowie v. Greenville, 69 Miss.	196, 184	Lawton v. Steele, 152 U. S.	133, 495
Bruss v. North Dakota, 153 U. S.		Lehr v. Steinway, 118 N. Y.	556, 505
391,	500	Lewis v. County, 60 Pa. St.	325, 195
Brooks v. Briggs, 32 Me.	447, 216	Lund v. Inhabitants, 9 Cush.	36, 506
Brown v. Lasselle, 6 Blackf.	147, 287	McHardy v. Wadsworth, 8 Mich.	349, 510
Burnett v. Burkhead, 21 Ark.	77, 287	Magee v. West End, 151 Mass.	240, 152
Byrd v. Rantman, 85 Md.	414, 388	Marcott v. Marquette, 49 Mich.	99, 342
Chase v. Ostrom, 50 Wis.	640, 230	Mathewson v. Hoffman, 77 Mich.	420, 235
Cherokee Nation v. State, 5 Pet.	1, 521	Middleton v. Gregorie, 2 Rich. L.	638, 236
Colman v. Shattuck, 62 N. Y.	348, 399	Missouri, K. & T. Ry. Co. v. Ha-	ber, 169 U. S. 613, 500
Com. v. Drew, 19 Pick.	179, 268	Moody v. Insurance, 52 Oh. St.	12, 477
Connely v. Rue, 148 Ill.	207, 389	Morley v. Liverpool, 85 Mich.	210, 294
Cottrill v. Chicago, 47 Wis.	634, 153	Osborne v. Florida, 164 U. S.	650, 501
Cox v. McLaughlin, 54 Cal.	605, 278	Palm v. Ohio, 18 Ill.	217, 278
Dale v. Hunneman, 12 Neb.	221, 440	Pendock v. Mackinder, Willes,	665, 420
Davis v. Shearer, 90 Wis.	250, 265	Pennsylvania v. Langendorf, 48	Oh. St. 316, 153
Delaney v. Boston, 2 Har. (Del.)		People v. Board, 40 N. Y.	154, 195
489,	235	Plumley v. Massachusetts, 155 U.	S. 461, 500
Denn v. White, 7 Term R.	112, 287	Prieve v. Wisconsin, 103 Wis.	537, 242
Dennis v. Wilson, 107 Mass.	591, 425	Queen v. Hazelton, L. R. 2 Crown	Cas. 134, 268
Dettra v. Kestner, 147 Pa. St.	566, 263	Rex v. Ford, 2 Salk.	690, 420
Ford v. Whitlock, 27 Vt.	265, 235	Rogers v. Cherrier, 75 Wis.	54, 230
Funkhouser v. Pogue, 13 Ark.		Rogers v. Rogers, 75 Hun,	133, 222
295,	287	Ross v. Winners, 6 N. J. L.	366, 287
Gladson v. Minn., 116 U. S.	427, 500	Schiffer v. Dietz, 83 N. Y.	300, 389
Gorman's Case, 124 Mass.	190, 545	Shepardson v. Perkins, 58 N. H.	354, 235
Greaves v. Neal, 57 Fed.	816, 409	Smith v. Youmans, 96 Wis.	103, 235, 239
Hall v. Hill, 2 Strange,	1094, 286	Soon Hing v. Crowley, 113 U. S.	703, 500
Hallahan v. Webber, 7 App. Div.		State v. Alden, 12 Ohio,	59, 164
122,	389		
Hammond v. Pennock, 61 N. Y.			
145,	389		
Harmon v. Washington, 7 Mac-			
key, 255,	184		
Havard v. Day, 62 Miss.	748, 399		
Hawkins v. Hatton, 2 Nett &			
McC. 374,	287		
Hawthorn v. People, 109 Ill.	308, 497, 500		
Hennington v. Georgia, 163 U. S.			
299,	500		
Holker v. Porlitt, L. R. 8 Exch.			
107,	235		
Hoosier v. Louisville, 131 Ind.			
575,	532		

CASES CITED

xv

	Page		Page
Sun v. Clark, 53 Oh. St. 414,	477	Waterman v. Clark, 76 Ill. 428,	510
Sutcliffe v. Booth, 32 L. J. Q. B. 136,	235	Watkins v. Birmingham, 120 Ala. 147,	184
Thompson v. Mutual, 66 Ill. App. 254,	258	Weatherby v. Meiklejohn, 56 Wis. 73,	236
Topeka v. Higgs, 38 Kan. 375,	505	Webster v. Dwelling, 53 Oh. St. 558,	477
Town v. King, 41 Vt. 611,	78	Wenstrom v. Purnell, 75 Md. 113,	389
Trustees v. City, 90 Ga. 634,	195	Wharton v. Winch, 140 N. Y. 287,	278
Trustees v. City, 12 Cush. 54,	195	Wheeler v. Robinson, 86 Hun. 561,	388
U. S. v. Boyd, 42 U. S. App. 637,	521	Williams v. Rhodes, 81 Ill. 571,	389
U. S. v. Holliday, 3 Wall. 407, 520,	521	Wilson v. Great Southern, 41 La. An. 1041,	152
Veeder v. Mudgett, 95 N. Y. 295,	115	Woodbury v. Short, 17 Vt. 387,	235, 236
Village v. Savoy, 103 Wis. 271,	242	Worcester v. State, 6 Pet. 515,	521
Washington v. Harmon, 147 U. S. 571,	185		

STATUTES CITED BY THE COURT.

UNITED STATES CONSTITUTION.

Art. 1, § 8. Powers of congress, 483
Amend. 14. Who are citizens, 483

UNITED STATES REVISED STATUTES.

§ 3477. Assignment of claim up- on U. S. void, 300	contract — Consent of postmaster general, 349, 350, 352
Supplement, vol. 1, p. 165, c. 107, § 2. Subletting of mail	

MINNESOTA CONSTITUTION.

Art. 1, § 2. Rights of citizens, 483	of special, 445, 447, 448, 449,
—, § 7. Same, 483, 484, 501	452, 453, 456, 457, 458, 461
—, § 10. Same, 484, 501	Art. 4, § 36. Municipal charters—
Art. 4, § 32a. Taxation of rail- road companies, 433, 437	General laws, 445, 448, 449, 451
—, § 33. Prohibition of spe- cial legislation, 445, 447, 448, 449, 451, 452, 453, 456, 457, 458, 459, 461, 462.	Art. 6, § 7. Probate court, 221, 222
—, § 34. General laws in place	Art. 9, § 1. Taxes to be equal, 47, 437
	—, § 3. Property subject to taxation, 437
	Art. 10, § 3. Corporations—Liabil- ity of stockholders, 114

MINNESOTA.

General Statutes 1866.

c. 122. Repeal of existing laws, 46

General Statutes 1878.

c. 16. Intoxicating liquors, 541, 542	cuninary profit, 101, 110, 114
—, § 4. Same, 542	c. 34, tit. 3. Other corporations,
c. 34, tit. 2. Corporations for pe-	111, 114

General Statutes 1894.

§ 481. Inspector of steam boilers, 355, 356, 358, 359, 360	§ 1515, subd. 10. Same—Property of principal, 195
§ 489. Same—License, 356	§ 1516. Same—Place of listing, 190, 195
§ 621. New counties, 65	§ 1522. Same—Decision in case of doubt, 191, 194, 196
§ 620. Same — Proclamation of governor, 64, 65, 66	§ 1526. Same—Deductions from credits, 194, 197
§ 657. County to have board of commissioners, 43	§ 1527. Same—What are not proper deductions, 197
§ 702. Same—Unorganized coun- ties, 43	§ 1551. Same — Listing omitted property by county au- ditor, 196
§ 1515, subd. 2. Taxes — Listing personal property of principal, 195	§ 1557. Same—Levy, 462
—, subd. 6. Same — Trust property, 190, 194, 195	

MINNESOTA—Continued.

General Statutes 1894—Continued.

§ 1558. Taxes—Rate per cent. for schools,	455	§ 4538. Guardian—Minor over 14 years may name,	74
§ 1589. Same—Review of judgment by supreme court,	193, 317	§ 4605. Guardian's sale—Guardian not to purchase,	1, 4, 5, 7
§ 1589, note 2. Forfeited tax for 1879 and prior years,	473	§ 4611. Guardian's sale—Statute of limitations,	7
§ 1592. Same—Sale to state,	89	§ 4814. Limited divorces,	67, 68
§ 1594. Same—Certificate prima facie evidence,	90, 396	§ 4961. Justice of the peace—Docket,	511
§ 1601. Same—Form of assignment from state,	89, 90	§ 5070. Appeal from justice of the peace—Transcript of evidence,	511
§ 1610. Same—Void sales—Judgment,	91, 345	§ 5136. Statute of limitations—Actions upon contract,	74, 257, 266, 368, 392
§ 1652. Same—Decision by state auditor,	191, 194, 196	§ 5185. Place of trial of civil actions—Change of venue,	307
§ 1654. Same—Notice of expiration of time for redemption,	10, 89	§ 5267. Opening judgment,	546
§ 1665. Same—Levy in unorganized counties,	45, 46, 47	§ 5296. Attachment—Affidavit of title by claimant,	124, 127
§ 1832. Highway—Dedication by use,	540	§ 5306. Garnishment—Affidavit,	427
c. 16, §§ 1990-2038. Intoxicating liquors,	541, 542	§ 5314. Garnishment — Exemption of wages,	427
§ 2029. Same—Penalty for sale without license,	542	§ 5338. Same — Minimum judgment in justice court,	426, 427, 428
§ 2218. Rate of interest—Exemption of building associations,	97, 100, 103	§ 5408. Dismissal of action,	404, 405
§ 2466. Lien for driving intermingled logs,	153, 154, 155, 156	§ 5409. Judgment on the merits,	405
§ 2794. Corporations — Building associations,	97, 100, 103	§ 5506. Costs on motion,	546
§ 3173. Insurance company — Fraud,	260	§ 5658. Who may be witnesses—Credibility,	248, 419
§ 3677. School districts — Elections,	169	§ 5659. Examination of adverse party—Officers of corporation,	199, 205, 282, 283, 285
§ 3694. School teachers—Written contracts,	470	§ 5662. Privileged communications,	283, 284, 286, 289
§ 4129. Chattel mortgage — Void unless filed,	126	§ 5738. Account books prima facie evidence,	31, 33, 34
§ 4227. Insolvency law of 1876,	407, 408, 409, 410	§ 5770. Actions for partition of real estate,	539
§ 4240. Insolvency law of 1881,	17, 137, 407, 408, 409, 410, 524	§ 5777. Same — Trial judgment upon report,	539
§ 4280. Trust—Grant to one for payment by another,	283	§ 5778. Same—Persons not affected by judgment,	538
§ 4281. Same—Trust for creditors,	283	§ 5792. Same—Estates for life,	539
§ 4472. Will—Election by surviving spouse,	138, 139	§ 5817. Actions to determine adverse claims,	20, 23, 24, 512
§ 4509. Time allowed creditors to present claims against estate of decedent,	61	§§ 5823-5829. Actions to determine boundary lines,	375, 377, 378, 379, 380
		§ 5829. Same,	379
		c. 76, §§ 5889-5911. Actions respecting corporations,	111, 329, 330, 334

MINNESOTA—Continued.

General Statutes 1894—Continued.

§ 5985. Mandamus directed to district court, 303, 305	§ 6711. Same—Obtaining money by fraudulent draft, 267, 268
§ 6042. Foreclosure of mortgage—Redemption, 56	§ 6878. Meandered lakes not to be drained, 241
§ 6044. Same—Redemption by creditors, 56	§ 6879. Same—Penalty, 241
§ 6142. Appeal from order—Superseas bond, 523, 524	§ 6949. Drunkenness a crime, 419
§ 6236. Mechanic's lien—Statement, 65	§ 7045. Storage of grain—Ballment, 133
§ 6709. Penal code—Grand larceny, 128, 131, 132, 133, 136, 297, 298, 299, 301	§ 7047. Same—Redelivery, 134
	§ 7650. Same—Express authority of owner, 133

Penal Code.

§ 415. Grand larceny, 128, 131, 132, 133, 136, 137

Session Laws—(General).

1853, c. 11, § 15. Unorganized counties, 40	1895, c. 175, § 52. Fire insurance—Conditions to be stated in policy, 31, 32
1872, c. 79. Cass county, 46	—, —, § 53. Same—Vacancy of insured premises, 414, 476, 477, 478, 479, 480, 481, 482
1875, c. 5, § 30. Taxes—Certificate of sale to be prima facie evidence, 396	—, c. 295. Discharge of sureties upon bond, 402, 403
1876, c. 44. Insolvency law, 407, 408, 409, 410	—, c. 320. Judgment notwithstanding verdict, 172, 442, 443
1881, c. 135. Forfeited taxes for 1879 and prior years, 473	—, c. 327, § 3. Habeas corpus—Final judgment by supreme court, 502
—, c. 148. Insolvency law, 17, 137, 407, 408, 409, 410, 524	—, c. 354. Municipal corporations — Contractors' bonds, 92, 95, 96, 97
1887, c. 6. Intoxicating liquors, 540, 541, 542, 543	1897, c. 221, § 14. Game and fish — Possession of deer, 518
—, c. 60, § 3. City of St. Paul—Actions to set aside tax sale, 395, 396	—, c. 248. Municipal corporations—Notice of personal injury, 76, 77, 79, 80
1891, c. 7, § 2. Same—Assessment for local improvement, 253	—, c. 292. Chattel mortgages, 126
1893, c. 68. Action to determine boundary lines, 375, 377, 378, 379, 380	1899, p. vi. Amendment to constitution—Municipal charters, 448
1895, c. 28. Change of venue, 302, 305, 306, 307	—, c. 40. Public schools in cities—Additional tax, 453, 455, 456, 457, 458, 459, 460, 461, 462.
—, c. 148. Storage of grain on line of railway, 133, 223, 225, 226, 227, 228	—, c. 50. Cities—Bonds to take up floating indebtedness, 445, 447, 450, 451, 452
—, c. 168. Taxation of railroad lands, 433, 436, 437	—, c. 77. School districts—Additional tax, 459
—, c. 175, § 20. Insurance—Misrepresentation by applicant, 480	
—, —, § 25. Same—Increase of risk, 474, 476, 477, 479, 480, 481, 482	

MINNESOTA—Continued.

Session Laws—(General)—Continued.

1899, c. 117. Taxes — Rate per cent.,	455	ing farm produce, 483, 484, 491, 492, 493, 494, 496, 497, 498, 499, 500, 501.
—, c. 225. Licensing persons sell-		

Session Laws—(Special).

1871, c. 75. Beltrami county,	43	er of amount paid for tax deed,	346
1873, c. 111. Railways — Gross-earnings tax, 433, 436,	437	1887, c. 7, subc. 7, tit. 1, § 60. Same	
1874, c. 1, subc. 7, tit. 1, § 30. City of St. Paul—Local assessment — Publication of notices,	401	—Reassessment, 254, 255	
—, —, subc. 12, § 17. City of St. Paul—Eminent domain,	252, 253	1889, c. 32, subc. 7, tit. 1, § 1. City of St. Paul—Eminent domain,	252, 253
1875, c. 5, § 30. Taxes—Certificate prima facie evidence,	396	—, —, —, —, § 30. Same	
—, c. 54. Duluth & I. R. Ry. Co. —Taxation, 433, 436,	437	—Local assessment — Publication of notices of sale,	400, 401
1876, c. 208. Cass county,	46	—, —, —, —, § 42. Same,	397
1881, c. 76, subc. 3, § 4. City of Minneapolis—Assistant clerk,	79	—, —, —, —, § 45. Same	
—, —, subc. 8, § 20. Same — Notice of personal injury,	76, 77, 78, 79, 80	—Sale to city,	346
1885, c. 86. City of Minneapolis—School tax,	456	—, —, —, § 50. Same—Recovery by purchaser of amount paid for tax deed—Statute of limitations,	345, 346, 347, 394, 395, 396, 397
1887, c. 7, subc. 7, tit. 1, § 45. City of St. Paul—Local assessment—Sale to city,	346	1891, c. 36, § 6. City of St. Paul—Expense of public schools,	456
—, —, —, —, § 50. Same —Recovery by purchas-		—, —, —, § 4. City of St. Paul—Assessment for local improvement,	253
		—, c. 7, § 2. Same,	253
		—, c. 312, § 13. City of Duluth—School district,	455

OHIO.

Laws 1879, p. 26. Fire insurance—Insurable value, 477



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MINNESOTA.

HENRY BROWN and Another v. HENRY FISCHER and Others.¹

June 12, 1899.

Nos. 11,554—(114).²

Guardian and Ward—Sale by Mother to Stepfather of Ward.

G. S. 1894, § 4605, provides that "no executor, administrator or guardian making the sale shall directly or individually purchase or be interested in the purchase of any part of the real estate so sold; and all sales made contrary to the provisions of this section shall be void." *Held* that, where the mother as guardian of her infant children sold their real estate to her (second) husband, she was interested in such sale, and the same was voidable at the election of the wards.

Evidence—Purchaser in Good Faith.

Held, also, that it conclusively appears from the evidence that the husband did not hold said real estate as a purchaser thereof in good faith.

Action in the district court for Hennepin county by Henry Brown, an infant, by his guardian ad litem, and Frederick Brown to set aside a guardian's sale. The case was tried before Harrison, J., who found in favor of plaintiffs; and from an order denying a motion to amend the findings of fact and conclusions of law, or for a new trial, defendant Henry Fischer appealed. Affirmed.

A. C. Middlestadt and Smith & Smith, for appellant.

Arctander & Arctander, for respondents.

BUCK, J.

One Henry Brown died intestate on January 14, 1882, leaving a widow, Christina Brown, and two children, the plaintiffs herein, viz.

¹ See note on page iv, *supra*.

² April, 1899, term.

Frederick Brown, born November 5, 1874, and Henry Brown, born January 1, 1877. At the time of Brown's death he owned and occupied in fee simple, as his homestead, lot 4 in block 21 of Christmas, Lewis, Reno & Sherman's addition to North Minneapolis. There was a third son living at the death of Henry Brown, but he died in early infancy. Christina Brown was the mother of all these children. On February 20, 1882, letters of administration on Brown's estate were issued to the widow, and in July of that year she was authorized to sell, and did sell, another lot, of which Brown died seised, to pay a mortgage thereon of \$300. There was but a small amount of personal estate left by Brown at the time of his decease. During the year of 1883 Christina Brown married Henry Fischer, one of the defendants herein, and she died intestate September 24, 1894. On October 26, 1887, a decree of distribution of Henry Brown's estate was made, entered, and rendered by the probate court of Hennepin county, assigning to Christina Fischer, formerly Christina Brown, said lot 4 for her natural life, and by said decree these plaintiffs became the owners in fee each of an undivided one-half part in said lot, subject to the said mother's life estate therein.

Upon her petition she was appointed guardian of these plaintiffs on October 21, 1887; she representing in said petition that they were seised of real estate not yielding any rents and profits, and that to protect and preserve their legal rights therein it was necessary that a guardian should be appointed. Christina Brown was appointed, qualified as such guardian, and gave a bond in the sum of \$100, which was approved by the court, and on November 15, 1887, she applied to the probate court for leave to sell the said minors' real estate, being the said lot 4, and which was then being used as a homestead by Christina Brown and her husband, Henry Fischer, and in said petition she represented to the probate court that she would join with said minor children in the proposed sale of said lot, and that the reason why it was necessary to sell said lot was that there was no income from the estate of the deceased with which to maintain and educate her said wards, and that it was to their interest that said lot be sold, and the proceeds put out at interest, or invested in some productive stocks, or used in the education of said minors, and that said sale would be to the benefit and advantage of

said minors. Although an order was made for all interested persons to show cause why license should not be granted to sell said real estate, the same was not served on the minors, plaintiffs herein, and said proceedings were kept secret from them by Christina Fischer, and plaintiffs had no notice or knowledge of said proposed sale.

On January 2, 1888, the probate court granted an order to sell the interests of said plaintiffs at private sale. The order provided for the appointment of Claus Mumm and Otto Schwartz, as appraisers; but they were never requested to act, and never qualified or acted as such appraisers, but two other persons, not appointed by the court, appraised the said lot, and falsely reported to the probate court that the value of said lot was only \$3,000, and that the value of the plaintiffs' interest therein was only \$699, and no more, when in truth and in fact said lot was then of the cash value of \$5,700, and the rental value of said property was \$120. The value of the interest and estate of plaintiffs at the time of the appraisal and sale thereof was \$3,607.32, subject to their mother's life estate therein of the value of \$2,092.68, all of which facts said guardian Christina Fischer and her husband, Henry Fischer, well knew. On January 12, 1888, said Christina Fischer sold at private sale to her said husband the interest of said plaintiffs in said lot for the sum of \$699, to be paid in cash, falsely representing to said court that the value of the whole of said premises was only \$3,000, and that the interests of her wards were only of the value of \$699. The fact that Henry Fischer, the purchaser of said property at the private sale, was the guardian's husband was withheld from said court, and it had no knowledge of said fact; nor did said Christina Fischer join in said sale, or convey her interest therein, as she had proposed that she would do in her said petition for the sale of said lot.

The guardian's sale was confirmed by the probate court, but, as the trial court finds, through the fraudulent representations of Christina Fischer and Henry Fischer, and their concealment from the court that they were husband and wife. The guardian's deed to Fischer was dated January 30, 1888; but she never filed any account of her guardianship with said probate court, and was never discharged by said court. The plaintiffs had no knowledge of such

sale, or of the proceedings which led up to it, until the month of December, 1895. The defendant Carolina Fischer is the present wife of Henry Fischer, and he claims to be the owner of said lot, subject to the lien of two mortgages thereon held by some of the defendants; and, as they were innocent parties, no hostile claim is made against them, and the trial court found in their favor, and the plaintiffs' rights in the property are subject to such liens. There are 75 separate findings of fact by the trial court, but we have stated the more salient ones, and, as we think, sufficiently so to a clear understanding of the case, save as they may be referred to in discussing the legal questions involved.

G. S. 1894, § 4605, provides that:

"No executor, administrator or guardian making the sale shall directly or indirectly purchase or be interested in the purchase of any part of the real estate so sold; and all sales made contrary to the provisions of this section shall be void."

It seems to us a very plain proposition that where a wife, as guardian of her infant children, sells to her husband their interest in a homestead estate, she is interested, if not directly, at least indirectly, in the sale. These children, under the statute, would have a right to occupy the homestead jointly with their mother until they became of lawful age. If their interest was lawfully sold to the husband, this right of occupancy on their part would cease, and the mother and her husband could occupy it exclusively. The purchase of their estate in the homestead by the husband would not cut off the mother's right therein, as she was then the lawful wife of Fischer, and, when he purchased the children's right, her right to remain on the homestead was inviolate, as well as his right to do so by virtue of his purchase. It may be said that in case of such sale the purchase price would belong to the children in lieu of their right of occupancy and income from their share or portion of the homestead. But that is not the question involved. In case of a valuable homestead producing a large income, such as a large hotel, store, or productive farm, the temptation for the wife and husband to procure absolute and exclusive control of the property, as against the rights of the minor children, by a sale of their interests therein by her, as guardian, to her husband, and especially to her second

husband, not the father of her children, might be very great, and lead to gross injustice, especially where such husband has great influence over the wife, as appears to have been the case at bar. And the temptation of the guardian mother to get exclusive control of such property as the children grew older, and possibly able to care for themselves for years before they arrived at full age, might be a great inducement for the mother, as such guardian, to sell to her husband their interest, and perhaps do so at a sacrifice of the infants' interest. In this view of the case she would have an interest, and perhaps we might appropriately say a direct interest, in the sale of such property or estate to her husband.

But there are other cogent reasons why in such sale to the husband she should be deemed to be interested personally. If the husband who purchased the children's estate should hold the property as a homestead, and there were no children, issue of such marriage, then upon his death, the wife surviving him, she would be entitled to the entire property, no matter how valuable. If the property was not a homestead, then, in case of his death, she surviving him, she would be entitled to one-third of said property in any event, and if there was no child and no lawful issue of any deceased child of the husband living at his death, he dying intestate, then the whole of such estate would descend to her. It therefore follows that a wife, as guardian of her minor children, in selling their real estate or their interest therein to her husband comes within the inhibition of said section 4605 of the General Statutes above quoted, and such sale is void. Not only does the statute prohibit any such sale, but it seems to be a general rule that any direct or indirect interest in the purchase by the guardian renders the sale void. Gary, Prob. Law, § 856.

It is apparent that self-interest conflicted with fiduciary duty, or that other considerations not conducing to the welfare and best interest of her wards influenced her in making this sale in violation, not only of the spirit, but of the letter, of the law. Public policy ought not and will not tolerate such misdoings on the part of a guardian of infant children. And when the relation of the parties, and the facts attending the transactions, appear as they do in this case, it is a safe rule for the courts to set aside the conveyance,

whether absolute fraud was intended by the guardian or not, especially where the sale is made in private, and not at a public auction. Even if fraud is not proven on the part of the guardian and the purchaser, the law seems to be imperative that a sale made by a guardian is void where she is interested in the purchase of any part of the real estate so sold. It might be difficult to prove fraud in many instances, and the poison be left to work its disastrous effect by reason of the infirmities of human testimony; hence the statute declares its mandatory rule where the fact of the guardian's interest, either direct or indirect, appears in the purchase.

If the premises are held by one who purchased them in good faith, a different rule might apply as between the wards and the purchaser. If Henry Fischer was not the promoter of this scheme to have the wards' interest sold to him by the guardian for much less than it was worth, he was an active participant in the transaction. He was active in getting Snyder and Kruth to appraise the property, who do not appear to have been appointed by the court to do so, and after other appraisers had been duly appointed, but who were never asked to make appraisal, and never did so, and no explanation was given therefor. When the appraisal was made the interest of the plaintiffs therein was worth \$3,607.32, and within 10 days thereafter Fischer, under oath, stated that the property was worth \$5,500 at a cash valuation, and yet he purchased the minors' interest for \$699. Of course he knew the plaintiffs were minors, that the mother was selling their interest in the lot, and, as he was presumed to know the law, he had notice that as his wife she had no right as guardian to sell to him the wards' property, because she would be interested in the sale. The record conclusively shows that he does not hold as one who purchased the premises in good faith.

Other questions have been raised and discussed, and we have examined them, but it is not necessary to pass upon them in the determination of this case. Whatever Henry Fischer has paid, laid out, and expended is allowed him by the trial court upon the evidence adduced, and the incumbrances upon the premises are duly provided for by the decree of the court below. No one appeals but Henry Fischer, and it appears that he has received from rents and

money obtained by placing mortgages upon the premises the sum of \$720.98 in excess of the sum paid by him for the purchase price of said land, improvements and taxes.

Our conclusion is that the order appealed from should be affirmed. So ordered.

MITCHELL, J.

This is an action for the recovery of real estate sold by a guardian, within the meaning of G. S. 1894, § 4611. Its provisions are not confined to actions of ejectment, pure and simple. Hence the limitation of time applicable to the action is the one prescribed by the section referred to, viz. any time within five years after the disability of infancy is removed. It follows that this action was not barred. Where a guardian sells the real estate of her ward to her own husband, she is interested in the purchase, within the meaning of G. S. 1894, § 4605, and the sale is voidable at the election of the ward. As the husband is bound to know the law, and must know his relation to his own wife, it follows that he cannot in such case be a bona fide purchaser, within the meaning of the law. This is decisive of the main issues in the case, and it becomes wholly immaterial whether the numerous findings of the court as to actual fraud, conspiracy, the value of the property, etc., are or are not sustained by the evidence.

It being determined that the plaintiff was entitled to recover the property, the only question that remained was as to the terms upon which a reconveyance should be decreed; that is, what allowances should be made to the defendant for the money paid to the guardian at the sale, or for money subsequently paid for improvements upon it, and what deductions, if any, from this should be made for his use and occupation of the premises. The court made itemized findings, showing specifically what he allowed the defendant and with what he charged him. The only objection which counsel urge in their brief against these findings is the general one that they erroneously proceed upon the theory that the mother of these children, who was also their guardian, was bound to support them out of her own estate during their minority, and that the court ought to have allowed the defendant for what they owed the mother's

estate for their maintenance during that time. Whether the mother was or was not bound, under the circumstances, to support the children is wholly immaterial. Conceding that she was not, but did so either gratuitously or otherwise, there is no principle of law by which defendant is entitled to the benefit of this as an offset to the plaintiffs' claim, or as a charge upon the land. In answer to the claim that it appears that the defendant paid the guardian \$700 on account of the land, in addition to the \$699, for which he purchased at the guardian's sale, we would say that there is no evidence that defendant ever paid the guardian a dollar for the wards' interest in the premises, except the original \$699. I therefore concur in the conclusion that the order appealed from should be affirmed.

CANTY, J.

I concur with MITCHELL, J. And, while I do not think that the amounts which defendant Henry Fischer received from the rents and the mortgage which he has placed on the premises exceed by \$720 the amounts which should be allowed him for improvements, taxes, purchase price, and interest thereon, I am of the opinion that the former amounts are at least as great a sum as the latter.

A. M. KNIGHT v. ANTON KNOBLAUCH and Another.

June 12, 1899.

Nos. 11,637—(132).

Redemption from Tax Sale—Form of Notice.

Notice when time for redemption from tax sale will expire *held* sufficient.

Action in the district court for Nobles county to determine adverse claims to land. The case was tried before P. E. Brown, J., who found in favor of plaintiff; and from a judgment entered pursuant to the findings, defendant Knoblauch appealed. Reversed.

Daniel Rohrer, for appellant.

M. O. Little, for respondent.

BUCK, J.

The defendant Thompson claimed title to the premises in controversy through certain tax certificates and the service of the notice of the expiration of the time of redemption. Whatever right and title he has obtained he conveyed to the defendant Knoblauch, and the controversy as to the title to said premises is between the latter and the plaintiff, Knight, who claims under the original patentee of the land.

There were several tax judgments entered against the land for several different years by reason of the nonpayment of delinquent taxes on the land in controversy, but they were all held invalid by the trial court except the judgment for the year 1889, for the delinquent taxes for the year 1887, which the court held valid; and on May 6, 1889, to enforce said judgment, the auditor of Nobles county, wherein the premises are situate, duly sold said land to the defendant Thompson, and a tax certificate of tax-judgment sale was delivered to him as provided by law. As this judgment and sale thereunder appear to have been valid, and Thompson having conveyed his estate in said land to Knoblauch, the question of the validity of the other judgments need not be considered, as all the questions involved are between the same parties, and relate to the same land; and, if Knoblauch's title is good under one judgment, the invalidity of the others would not defeat his title. But, while this judgment for the year 1889 is valid, the absolute title by virtue of the sale thereunder would not pass to Thompson, the purchaser, unless a proper and valid notice of the expiration of the time of redemption from said tax sale was given to the person in whose name the land was assessed; or, if such person could not be found in the county, and there was a person in the actual possession of the land, then such service to be made on him.

The respondent's counsel, in his brief, says that the only question which is really necessary to a determination on this appeal is the sufficiency of the notices to divest the respondent's title to the land. This relieves us from discussing or passing upon any other questions, as upon the record the judgment appealed from must be reversed. This grows out of the fact that, in our opinion, the notice when the time for redemption would expire under the tax-judgment

sale for the year 1889 for delinquent taxes for the year 1887 was a sufficient and valid one. That notice was in the following words and figures, viz.:

NOTICE OF EXPIRATION OF REDEMPTION.

In Whose Name Assessed.	Subdivision of Section, Lot, or Block.	Sec.	Twp.	Range.	No. Acres.	Amt. Sold for.	Interest, Penalty, and Costs.	Total Amount Required to Redeem.
Anton Knoblauch.	S. W. ¼	14	102	38	160	\$16.70	\$14.40	\$31.10

Office of County Auditor, Nobles County, Minnesota.
To Anton Knoblauch:

You are hereby notified that pursuant to the tax judgment entered in the district court in the county of Nobles, state of Minnesota, on the 22nd day of March, 1899, the land hereinbefore described, assessed in your name, was sold for tax of 1887 on the 6th day of May, 1889, and that the time of redemption from said sale allowed by law will expire 60 days after service of this notice and proof of the service thereof has been filed with the county auditor. In addition to the amount above stated as necessary to redeem from said sale, the cost of service of this notice must be paid.

Witness my hand and seal at Worthington, in said county of Nobles, this 26th day of March, 1896. John J. Kendlen,
County Auditor.

[Seal of Auditor of Nobles County.]

This notice was given pursuant to what is now G. S. 1894, § 1654, which provides that every person holding a tax certificate shall, after the expiration of the time for the redemption of the lands therein described, present such certificate to the county auditor, and thereupon the auditor shall prepare under his hand and official seal a notice to the person in whose name such lands are assessed, specifying the amount required to redeem such land from such sale, exclusive of the costs to accrue upon such notice, and the time when the redemption period will expire, which notice the auditor shall deliver to the party applying therefor, who shall deliver the same to the sheriff of the proper county for service and return, and the sheriff shall, within 20 days after the receipt by him of said notice, serve and make a return of the same to him. No question is made

as to any irregularity in the service of the notice, but the objection goes to the insufficiency of the notice itself. The title to the lands sold at tax sales as provided by statute does not rest in the purchaser, nor the time for redemption expire, until the notice contemplated by said section shall have been given by the purchaser or person holding such tax certificates.

This notice is headed "Notice of Expiration of Redemption," and under this heading is the name of the person in whose name such lands are assessed, a description of the land sold, the amount sold for, and the amount required to redeem from such sale. Then follows in the body of the notice a designation of the person to whom it is addressed, being the person in whose name the land is assessed, and a statement of the tax judgment, when and where entered, and the date of the tax sale; that the time of redemption from said sale will expire 60 days after service of this notice and proof of said service has been filed with the county auditor; also that, in addition to the amount above stated as necessary to redeem from said sale, the costs of service of the notice must be paid. This notice is signed by the county auditor of Nobles county, and issued under his official seal. We think this notice is an entire instrument from and including the words "Notice of Expiration of Redemption" to the signature of the county auditor, inclusive. The body of the notice refers to and adopts in express language a description of the land, and the amount necessary to redeem as stated in the heading; and it is clear that all the essential ingredients necessary to form a sufficient notice can be found therein, and all that is necessary under the statute to warn the owner or redemptioner that he must pay the purchase money, or lose his land. The amount required to redeem from such tax sale is the amount the land sold for, including interest, penalty, and costs, and interest on the whole amount up to the expiration of the 60 days allowed by law for redemption after service of the notice to so redeem.

Other questions have been discussed, especially in the elaborate brief of the counsel for the appellant, but it will be time enough to pass upon them when necessarily involved in another action. It is not necessary to do so in this action.

Judgment reversed.

MARY STERLING and Others v. GEORGE H STERLING.

June 12, 1899.

Nos. 11,644—(51).

Trust—Title—Estoppel of Trustee.

A trustee is estopped from denying the title or estate of the person for whose benefit it was created, and for whose use he holds it.

Action in the district court for Le Sueur county to compel defendant to execute to plaintiffs a conveyance in pursuance of the terms of a deed of trust. From an order, Cadwell, J., overruling a demurrer to the complaint, defendant appealed. Affirmed.

Thos. Hessian, for appellant.

P. McGovern, for respondents.

BUCK, J.

The plaintiff Mary Sterling is the widow, and the other plaintiffs are the children and heirs at law, of M. Wallace Sterling, who died at the village of Elysian, in Le Sueur county, in this state, on November 4, 1896. The plaintiffs allege in their complaint that on December 20, 1870, there was conveyed to the defendant, George H. Sterling, and to one Byron D. Sterling, by a deed of trust, the W. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 22 in township 109 N., of range 24, in said county, and that the defendant duly accepted the trust imposed by said deed, and continued to act as such trustee from the time of the execution of said deed until the death of said M. Wallace Sterling in November, 1896; that said Byron D. Sterling, the other grantee named in said deed, died in the year 1888. A copy of the deed was made a part of the complaint, and set out in full therein. The relief sought is that the defendant be required to execute a deed to plaintiffs as required by the terms of the trust deed; they alleging themselves to be the owners of said premises, and that defendant has no right, title, or interest therein. The defendant interposed a demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and defendant appeals.

The deed or instrument in controversy recites that John L.

Meagher was the administrator of the estate of Gottlieb Schultz, late of Elysian, in said county of Le Sueur, deceased, and that by an order of the probate court of said county made June 9, 1870, he (Meagher), in his capacity as such administrator, was authorized to sell at public vendue the estate of said Gottlieb Schultz, and that he took the necessary steps to do so, and that on November 19 he did sell the said premises to George H. Sterling and Byron D. Sterling for the sum of \$500, which they paid to the said administrator,—they being the highest bidders,—and said sale was confirmed by the probate court of Le Sueur county. The deed furthermore recited that the administrators did grant, bargain, sell, and convey unto said George H. Sterling and Byron D. Sterling all the real estate which we have described, and then contained this clause:

“To be held by said George H. Sterling and Byron D. Sterling in trust to receive the rents and profits of said land, and apply the same to the use and support of M. Wallace Sterling and his family during the lifetime of said M. Wallace Sterling, and then said land to be deeded to the heirs at law of said M. Wallace Sterling, and their heirs and assigns forever. Said George H. Sterling and Byron D. Sterling are not to make any charge nor receive any compensation for their services as trustees as above set forth. To have and hold the above-bargained premises to the said George H. Sterling and Byron D. Sterling as above, and their use and behoof as above set forth forever. In witness whereof, I, the said John L. Meagher aforesaid, have hereunto set my hand and seal this 20th day of December, A. D. 1870.

John L. Meagher,

Administrator of the Estate of Gottlieb Schultz.

Signed and delivered in presence of

N. R. Maynard and G. G. Maynard.”

The defendant contends that the deed conveyed no interest in the land therein to M. Wallace Sterling or to the plaintiffs, his widow and children, for the reason that it was an administrator's deed, and that the administrator had no authority to create a trust, and hence the deed conveyed the title to the defendant, George H. Sterling, and Byron D. Sterling. On the other hand, the plaintiffs contend that it was a trust deed; that the trustee accepted the trust and acted under its terms, and thus recognized the right of the cestui que trust according to the terms of the deed, and cannot refuse to carry out its terms in full, including the conveyance of the

land, or set up a title adversely to plaintiffs, or dispute the validity of the trust, especially for the trustee's own benefit.

It may be conceded that an administrator, as such, cannot ordinarily, if at all, convey land and impress upon it a trust; but if the trustee named in the deed accepts the supposed trust, and acts thereunder, he must assume its validity until it is actually impeached. He certainly could not allege the invalidity of his appointment as a defense for not accounting for the trust property. The defendant for a period of 26 years held and acted under this trust deed, collecting rents, and applied the same to the use and support of M. Wallace Sterling and his family. He and the other trustee, Byron D. Sterling, paid the consideration for the deed, and it may be assumed that the terms and conditions were inserted at their request, or at least with their knowledge and consent. And, if so, then they consented that the deed should be impressed with the trust therein declared, and which for so long a period they have not denied, rejected, or repudiated.

A trustee is estopped from denying the title or estate of the person for whose benefit it was created, and for whose use he holds it. The law regards with a jealous eye all transactions of a trustee with the cestui que trust's estate, and will not permit the trustee to take any undue or technical advantage over the cestui que trust. And this is equally as applicable to a trustee who holds for the benefit and protection of those entitled to the remainder as to those who are entitled to the immediate enjoyment of the estate given them. If a trustee does not wish to accept the trusteeship and be bound by the terms of the trust deed, he should not intermeddle with the matters at all; but, when he does accept, he must not do any act injurious to the estate. In this case defendant, Sterling, held the legal title in the property for the benefit of M. Wallace Sterling and these plaintiffs; and by the terms of the deed and by his own conduct he is estopped from claiming or having any personal right, interest, or estate in the property described in the trust deed. The recitals in the deed show that the probate court had acquired jurisdiction of the subject-matter, and that the administrator was duly licensed to sell at public vendue the property in question, and that the sale was duly made and confirmed; and, as the trustees accepted

the deed and acted under its provisions, they are bound by such recitals, and cannot now be allowed to assail the validity of the proceedings or the terms of the deed for their own benefit. Unless the beneficiaries consent, the trust created cannot be changed or altered by any one; nor can the trustees hamper or fetter its exercise so as to make it beneficial to themselves or to third persons. And the wilful refusal of the defendant trustee to convey to the plaintiffs, who are the beneficiaries under the trust deed, renders him liable to an action in their behalf to enforce their rights in the property in controversy.

Order affirmed.

JAQUIEN SCHENK and Another v. E. ALINE DEXTER.

June 12, 1899.

Nos. 11,667—(147).

Loan Agent—Authority to Receive Payment of Mortgage—Possession of Securities.

An agent authorized to loan money upon coupon notes and mortgage security, which are returned to and retained by the principal, has no implied authority to collect the same, without having lawful possession of such coupon notes and mortgage; and, when he has such possession, he has no implied authority to collect them before due.

Same—Finding not Sustained by Evidence.

Evidence considered, and *held*, that it did not justify the finding of the trial court that the agents had both express and implied authority to collect and receive payment of certain notes and mortgage.

Action in the district court for Swift county for cancellation and discharge of a mortgage. The case was tried before Powers, J., who found in favor of plaintiffs; and from a judgment entered pursuant to the findings, defendant appealed. **Reversed.**

Flannery & Cooke, for appellant.

E. T. Young, for respondents.

BUCK, J.

This action was brought to cancel and discharge of record a mortgage executed and delivered by plaintiffs to the defendant, dated

December 26, 1891. It was given to secure the payment of a promissory note of the same date made by the plaintiffs, whereby they promised to pay defendant, five years after date, the sum of \$900, at Philadelphia, Pennsylvania, with interest at the rate of 7 per cent. per annum, payable semiannually, according to the terms of 10 coupon notes attached thereto. The defendant was a resident of Philadelphia, in the state of Pennsylvania, and made the loan through her agents, A. F. & L. E. Kelley, of Minneapolis, Minnesota, who were then, and for a long time prior thereto had been, engaged in loaning money on farm and city property for various parties, and collecting the interest and principal as the coupons and notes matured on loans as made by them. They commenced to loan money for defendant November 15, 1883, and made 13 loans, in all, at different times, for defendant; the last one dated in October, 1895. The business between the parties was carried on by correspondence, which is in evidence, and, when money was sent by defendant to the Kelleys, the latter decided upon the security and made the loans; and all papers, except abstracts of title, were sent to the defendant. As the interest coupons matured, the defendant sent them to the Kelleys for collection, and they made the collections, and remitted the same to the defendant. As the mortgages matured, the Kelleys would send blank releases to defendant, to be by her executed, and returned to them, with the note and mortgage for collection.

The interest coupons on the note and mortgage in question were all paid, up to and including the one due January 1, 1896, and had been collected and remitted by the Kelleys. The coupon due July 1, 1896, was not paid, and on July 2, the cashier of the Citizens' Bank of Appleton, Minnesota, wrote to the Kelleys that if they would send a satisfaction of the loan of Schenk, \$900, he would send them a draft for the amount due. On July 3, 1896, the Kelleys answered, saying that such mortgage was not due until December 26 next, but, if he would send a draft at once for \$1,001, to cover interest to the 15th instant, they would send for papers, and forward to him as soon as received. On July 6, 1896, the cashier sent the draft, \$1,001, and requested satisfaction and all papers, but requested them not to cancel the note, as he might have to fall back on the old mortgage. The draft was not sent to the defendant, Dexter, nor

its proceeds paid her. On September 12, 1896, the Kelleys made an assignment under the insolvent laws of this state. They never wrote Dexter for a satisfaction of the mortgage, and never communicated to Dexter the receipt of the \$1,001 draft; and when they received it deposited it, on July 8, 1896, in the Union National Bank of Minneapolis, to their own credit, and it was used by them in the regular course of their business, and none of it was ever received by Dexter; and the Kelleys did not credit it to Dexter until after the Kelleys had made an assignment, and before the mortgage was due.

The trial court found that the Kelleys were the general agents of the defendant, Dexter, for the handling of said loan and other investments, and had full power and authority, both express and implied, to collect both principal and interest, and to hold or transmit such payments to the defendant, and that said mortgage had been paid in full by the plaintiffs to defendant, and ordered the mortgage to be canceled of record, and that the note and coupons be canceled. To sustain this view of the case, the court permitted plaintiffs to show by evidence the manner in which for many years the Kelleys conducted their loan and collecting business, collecting interest and principal for certain other eastern investors, and that by reason of such a long course of dealing the Kelleys must be deemed to have been the general agents of defendant, relating to all her loans in Minnesota. Whether such evidence was competent, we need not determine; for it conclusively appears that defendant never knew of such conduct on the part of the Kelleys, and was not, therefore, bound by it. And in her own business dealings in the loaning of her money by the Kelleys, and the collection thereof, there was but one instance where the Kelleys collected a mortgage before it was due. This was the Morley mortgage, and its payment before due was not authorized by Dexter, and she knew nothing of such fact until it was due, and the Kelleys made this collection without having the note or release in their possession. The fact that they collected the money before due was concealed from defendant by the Kelleys, and they wrote her that it would be paid when due. Nor does it appear that plaintiffs ever knew or relied upon such alleged act of the Kelleys in receiving payment of the Morley mortgage before it was due.

The business between the Kelleys and Dexter was carried on by correspondence only, and all the information she had in relation to the methods of the Kelleys in conducting her business was that which she received from the letters, and they are all before the court. This evidence is conclusive that the Kelleys never assumed, in such correspondence, to have authority to receive payment of any note belonging to her before it was due, or before receiving a satisfaction of the mortgage. When each of the 13 loans was made by the Kelleys for defendant, the note and mortgage were sent to defendant, and in every instance retained by her until due; and, so far as she knew, the Kelleys never collected or attempted to collect a mortgage before it was due and a release sent. The Kelleys had no authority to assume and declare the principal of this mortgage to be due on default in the payment of one or more coupons. And payment to them of the interest and entire principal in such case, without the possession of the note and mortgage, was unauthorized, and the plaintiffs made such payment at their peril and own risk. *Trull v. Hammond*, 71 Minn. 172, 73 N. W. 642. Or, if the Citizens' Bank of Appleton paid the draft of \$1,001 for itself or plaintiffs, the same rule would apply. The dealings between the bank and the Kelleys cannot be charged up to the defendant. They knew that the principal of the note and mortgage was not due for six months at the time when they received the \$1,001 draft. If the bank was guilty of negligence in dealing with the Kelleys, that is a matter to be settled between it and plaintiffs, not to be made a cause of action against defendant upon an unauthorized act of one claiming to be her agent as to this particular act. The bank or plaintiffs should have acted more prudently, and obtained a release of the mortgage before paying it, as there does not appear to have been sufficient ground for their doing it safely without such release or satisfaction.

It is claimed, however, that there was express authority for the Kelleys to receive payment of this mortgage, and this contention rests principally upon two letters written by the husband of defendant to the Kelleys. The first one was dated June 22, 1894, and in it he states:

"Manage all in the future as you have in the past regarding loans, as you think for the best. I have no disposition to question anything you do in the matter, for I know it is the best."

And under date of February 19, 1895, he again wrote:

"Manage all matters as you think best regarding our investments, and be sure of the commendation of very truly yours, E. M. Dexter."

There is no warrant in this language to justify the Kelleys in violating their authority, or the law as to their rights as mere agents, in making collections before the debt was due. They had never previous to this time done so,—at least, not to the knowledge of defendant,—nor made collections without the possession of the coupons as evidence of their right to collect. Their past conduct had been all right, as to Dexter, and in the light afforded by that conduct were the letters written. They were authorized to manage matters as they thought best regarding investments, based upon their past acts; and, in every instance where a note was to be paid, the Kelleys had notified defendant of the fact, and sent defendant a release, to be executed by her and returned before payment. Not only this, but the Kelleys did not assume, in their letters to the bank, any authority to collect the mortgage in question without a release from Dexter; for under date of July 3, 1896, they wrote the cashier that the mortgage was not due until December 26 next, and they would send for papers, and forward them as soon as received, if the cashier would send the draft. This letter of the Kelleys fairly conveyed to the bank or its cashier the information that it was necessary for the Kelleys to send to defendant for the papers (that is, the mortgage, note, and satisfaction or release) before they could do anything further, as they did not claim to have possession of the papers, or authority to release the mortgage. The cashier knew this, and, if it was not negligence on his part in sending the draft, it was a serious mistake, for which the defendant is not liable. Not only this, but the cashier does not claim that he knew of any express or implied authority on the part of the Kelleys to secure payment without the possession of the papers; and he knew that they did not have them, for the Kelleys had so informed him.

Plaintiffs do not claim, or show by evidence, that they knew anything about the Kelleys' and defendant's method of making loans, or that they relied upon such method when the draft of \$1,001 was sent to the Kelleys.

We are therefore of the opinion that the evidence completely fails to show either express or implied authority on the part of the Kelleys to recover either interest or principal, or that the mortgage in question has been paid.

Judgment reversed.

TIMOTHY R. PALMER and Another v. THOMAS J. YORKS and Another.

June 14, 1899.

Nos. 11,578—(128).

Action to Remove a Cloud upon Title—Action to Determine Adverse Claims—Knudson v. Curley Overruled.

Held, G. S. 1894, § 5817, authorizing the bringing of an action to determine an adverse claim to land, authorizes such an action to determine one particular adverse claim, which may be specified or described in the complaint, and, if an equity action to remove a cloud from the title cannot be sustained as such, it may still be sustained as an action to determine adverse claims under the statute, if the complaint is sufficient for that purpose; overruling former decisions holding to the contrary.

Same—Possession of Plaintiff Immaterial.

Where, in such an action, the defendant in his answer sets up his own claims to the land, and asks to have plaintiff's claims adjudged void, the question of whether or not the plaintiff is in possession, or the land is vacant and unoccupied, is thereby rendered immaterial.

Action in the district court for Washington county to quiet title to land. The case was tried before Crosby, J., who found in favor of plaintiffs; and from a judgment entered pursuant to the findings, defendants appealed. Affirmed.

F. W. Gail and *J. N. Castle*, for appellants.

B. H. Schriber, for respondents.

CANTY, J.

On May 13, 1886, one Gale was the owner of a certain quarter section of land, and on that day conveyed the same by quitclaim deed to one Senrick. Thereafter, on the 31st of the same month, Senrick, by quitclaim deed, conveyed the land to defendant Thomas J. Yorks. These deeds were both recorded December 28, 1891, but not before. On August 31, 1891, Gale made a quitclaim deed of the land to plaintiff Whaley, and this deed was recorded December 11, 1891, 17 days before said other two deeds were recorded. Whaley afterwards conveyed a half interest to plaintiff Palmer.

This is an action in the form of a bill in equity to quiet plaintiffs' title. The foregoing facts are alleged in the complaint. It is further alleged, in effect, that Whaley purchased in good faith, for a valuable consideration, and without notice of the existence of said deeds to Senrick and Yorks. The prayer is that the latter deeds be canceled, and that plaintiffs be declared the owners of the land. The answer denies that plaintiffs or either of them are innocent purchasers for value, without notice; admits all of the other allegations of the complaint; alleges that Thomas J. Yorks is the owner of the land; and prays that plaintiffs be adjudged to have no right, title, or interest therein. On the trial, the court found that Whaley was an innocent purchaser for value, without notice; that plaintiffs are the owners of the land; and that the deed to Senrick and the one from him to Yorks are a cloud on plaintiffs' title; and ordered judgment that the same be cancelled. From the judgment entered thereon, defendants appeal.

Appellants contend that, as against the prior recorded deed to plaintiff Whaley, the deed to Senrick, and the deed from him to Yorks, were void on their face, and, as the court found, void in fact, and it follows that they were no cloud on plaintiffs' title, and therefore this action cannot be maintained; citing *Mogan v. Carter*, 48 Minn. 501, 51 N. W. 614; and *Maloney v. Finnegan*, 38 Minn. 70, 35 N. W. 723. On the other hand, respondents contend that the burden was on them to show that they were innocent purchasers for value, without notice; citing *Roussain v. Patten*, 46 Minn. 308, 48 N. W. 1122 (see also *Mead v. Randall*, 68 Minn. 233, 71 N. W. 31);

that, therefore, on the face of the records in the office of the register of deeds, defendants were *prima facie* the owners of the land, and it would take parol evidence to show they were not; but plaintiffs were the owners, and that, therefore, the deed to Senrick, and the deed from him to Yorks, were a cloud on plaintiffs' title, and a bill in equity to remove that cloud can be maintained. The latter deeds were kept off record for more than five and a half years.

Speaking for myself alone, I will say that it seems to me that a deed as stale as these were at the time they were recorded is discredited on its face, and there should be no presumption that it conveys a title paramount to a deed subsequently executed, and first recorded. As between the immediate parties, the doctrine of *Roussain v. Patten* and *Mead v. Randall* is properly applied to a case where the prior instrument subsequently recorded is of recent date, or where an apparently bona fide attempt to record it was made, but failed by reason of some mistake, as was the case in *Nickerson v. Wells-Stone Mercantile Co.*, 71 Minn. 230, 74 N. W. 891. But, in any event, does the rule of these cases apply to plaintiff Palmer, who is not one of the immediate parties?

It is not necessary to decide these points, or to decide whether the old bill in equity could be maintained in such a case as this, if it were held that the deed to Senrick, and the deed from him to Yorks, were presumptively void on their face, and could only be held valid by the aid of oral evidence. We do not deem it necessary to review the abstruse learning to be found in the books, to determine whether such a bill in equity would lie in such a case. We are of the opinion that this action may be maintained as a statutory action to determine adverse claims. It is true that the complaint is framed as one to remove a specified cloud from the title. It is also true that this court has several times held that if such a complaint could not, under the old practice, be sustained as a bill in equity for that purpose, it is defective, and cannot, under our practice, be sustained as a complaint in a statutory action to determine adverse claims. See *Walton v. Perkins*, 28 Minn. 413, 10 N. W. 424; *Knudson v. Curley*, 30 Minn. 433, 15 N. W. 873. But we are of the opinion that these decisions should be overruled.

G. S. 1894, § 5817, which authorizes the bringing of actions to determine adverse claims, reads as follows:

"An action may be brought by any person in possession, by himself or his tenant, of real property, against any person who claims an estate or interest therein or lien upon the same, adverse to him, for the purpose of determining such adverse claim, estate, lien or interest; and any person having or claiming title to vacant or unoccupied real estate may bring an action against any person claiming an estate or interest therein adverse to him, for the purpose of determining such adverse claim, and the rights of the parties respectively."

"An action may be brought * * * against any person who claims an estate or interest therein or lien upon the same, * * * for the purpose of determining such adverse claim, estate, lien or interest." Then this statute authorizes the bringing of an action to determine "an estate," an "interest," or a "lien." Can anything be clearer than that this statute authorizes the bringing of an action to determine one particular claim, or one particular lien, or one particular interest in the land? But how can an action be brought to determine one particular lien, claim, or interest unless that particular lien, claim, or interest is specified or described, so that it may be identified? We make no question but that the statute authorizes the bringing of an action to determine all the liens, estates, and interests which the defendants may claim to hold in or upon the specified land. This is the form of action usually brought under this statute, and it is a very simple, convenient, and effective remedy. But, from the language of the statute, it is far clearer that it authorizes the bringing of an action to determine one particular lien, claim, interest, or estate than it is that such statute authorizes the bringing of such a dragnet action, to determine all adverse liens, estates, and interests. Undoubtedly, the main purpose of that statute was to remedy a serious defect which existed in the old equity jurisprudence by reason of the rule that a bill *quia timet* would not lie to remove a cloud from the title unless that cloud was apparently valid on its face. The Code of Civil Procedure abolished all forms of action, and yet it would seem that this court overlooked that fact when it held that an action brought

on the theory that it is an action in equity to remove a cloud cannot be sustained as an action to determine adverse claims, if the complaint is sufficient for that purpose.

Then, we are of the opinion that this action can be maintained under the statute to remove the specified cloud described in the complaint, if the complaint is in other respects sufficient. It is true that the complaint does not allege that plaintiffs are in possession or that the land is vacant and unoccupied. But the answer sets up a counterclaim or cross action to determine the adverse claims of plaintiffs to the same land, and this rendered immaterial the question of whether or not plaintiffs are in possession or the land is vacant and unoccupied. *Hooper v. Henry*, 31 Minn. 264, 17 N. W. 476; *Mitchell v. McFarland*, 47 Minn. 535, 50 N. W. 610. In our opinion, the complaint is sufficient.

Judgment affirmed.

SAMUEL H. HALL v. UNITED STATES FIDELITY & GUARANTY
COMPANY.

June 14, 1899.

Nos. 11,588—(180).

Fidelity Insurance—Contract of Insurer—Investigation of Employee.

A certain instrument construed, and *held* to be a binding contract; that the words, "Subject to result of investigation," written across the face of the instrument, did not convert it into a mere proposal for a contract, but gave the one party a right to cancel it, so as to prevent any future liability after notice of such cancellation.

Admissions of Insured as to Accounts—Evidence against Insurer.

Held, certain admissions of the principal were made in the course of the business, the faithful performance of which the surety guaranteed; that such admissions were a part of the *res gestæ*, and are evidence against the surety.

Action in the district court for Hennepin county to recover on a contract guarantying the fidelity of an employee. The case was tried before McGee, J., and a jury, which rendered a verdict in

favor of plaintiff for \$211.53; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

Cobb & Wheelwright, for appellant.

Hendrix & Merritt, for respondent.

CANTY, J.

Defendant is, and at the times hereinafter stated was, a corporation engaged in the business of guarantying the honesty and fidelity of persons in the employ of others, and plaintiff, Hall, was engaged in the business of buying and selling potatoes and other produce. His place of business was at Minneapolis, but he purchased potatoes in the country towns tributary thereto. On March 9, 1898, one Newton, a stranger to plaintiff, applied to him for employment as a purchaser of potatoes for plaintiff, as his agent, on commission, at River Falls, Wisconsin. Defendant had been in the habit of insuring the fidelity of plaintiff's employees, and plaintiff sent his agent with Newton to defendant's office, in Minneapolis, to procure insurance for him as such purchaser. The agent then made to defendant a written application for the insurance, and informed defendant that Newton was an entire stranger to him and to plaintiff, and that plaintiff wanted the insurance without delay. The next day defendant executed to plaintiff the following contract:

"In consideration of the sum of five and no/100 dollars, the United States Fidelity and Guaranty Company hereby guaranties the fidelity of A. Tracy Newton in the sum of five hundred dollars, in favor of S. H. Hall & Co., from the 9th day of March, 1898, to the 9th day of March, 1899, subject to all the covenants and conditions set forth and expressed in the bond of this company to be issued on even date herewith, and forwarded from the home office within fifteen days from date of issue. All liability of the company on this instrument shall cease and determine on the issuance by the company of the duly-executed bond, or if the bond is not issued on the fifteenth day from the countersigning of said instrument by the general agent."

Across the face of this contract was written in ink, "Subject to result of investigation." On receiving this contract, plaintiff employed Newton, and advanced him money to purchase potatoes for plaintiff at River Falls. Plaintiff brought this action on the con-

tract, under the claim that Newton embezzled \$211.53 of this money within the 15 days mentioned in the contract. On the trial, plaintiff had a verdict for that amount, and defendant appeals from an order denying a new trial.

Appellant contends that the words, "Subject to result of investigation," written across the face of the contract, converted what would otherwise be a contract into a mere proposal for one, to become binding on defendant only in case the investigation proved satisfactory. We cannot so hold. This construction would render the temporary contract wholly meaningless and nugatory. Plaintiff had already made an application for insurance, and there was no occasion for a counter proposal. The contract states, in plain and positive terms, that defendant "hereby guaranties the fidelity" of Newton, and that all liability on the instrument shall cease on issuance of the regular bond, or in 15 days if no such bond is issued. Why should such language be used, if it was not intended to mean anything? If a mere proposal was intended, why not rest on plaintiff's written application, and wait for the regular bond? In our opinion, the words, "Subject to result of investigation," should be so construed as merely to give to defendant the right to cancel the contract on further investigation, and thereby exempt itself from liability for any loss resulting from continuing Newton in the employ of plaintiff after notice of the cancellation. This construction will give effect to all parts of the contract, and it seems to us is more in accord with the intention of the parties.

Within 10 days after Newton was so employed, plaintiff advanced to him in the aggregate \$1,416.94, with which to purchase potatoes. The last sum so advanced was \$590, on March 19, 1898. A few days after this plaintiff sent another employee—one Eaton—to River Falls to take Newton's place, and complete the transactions commenced by him. Newton then returned to Minneapolis, and was there requested by plaintiff to take up his account with plaintiff's bookkeeper. Newton proceeded to do so, examined his account in plaintiff's books, admitted that it was correct, and that the balance there appearing against him was correct, but that he did not have the balance of the money there charged against him; that he did not know what he did with it; and he offered to work

for plaintiff in order to pay it. The competency of these admissions is assailed by appellant. We are of the opinion that these admissions were a part of the *res gestæ*, and were competent. A part of Newton's duty was to account for the moneys received by him as plaintiff's agent. Defendant guarantied Newton's fidelity in making that accounting as much as it did his fidelity in any other part of his duty as plaintiff's agent. See *Lancashire Ins. Co. v. Callahan*, 68 Minn. 277, 71 N. W. 261; *Capital Fire Ins. Co. v. Watson*, 76 Minn. 387.

After Eaton took Newton's place at River Falls, the account with Eaton in plaintiff's books was kept as a continuance of the account of Newton and as a part of that account. There is nothing in appellant's claim that, because the account was kept in this manner, the credits shown by the whole continuous account should be applied to the oldest items on the debit side, and, when so applied, it appears that the whole sum received by Newton has been repaid. The actual facts were fully explained by the oral evidence. Neither is there anything in the claim that Newton's said admissions are not competent because it appears that they were made with reference to this whole continuous account. Plaintiff and his bookkeeper each testified that the bookkeeper and Newton went over the whole account item by item. This disposes of all the questions raised having any merit.

Order affirmed.

AULTMAN COMPANY v. JOHN MOSLOSKI and Another.

June 14, 1899.

Nos. 11,622—(117).

Witness—Defects in Steam Engine—Competency of Farmer to Prove Defects.

A farmer who was licensed to run a steam threshing-machine engine testified to certain defects in the engine, discovered in operating it. He was not a mechanical engineer, and it did not appear that he knew whether the defects could be remedied, and, if so, the cost of remedying the same. *Held*, he was not competent to prove that the engine was

worthless, and his evidence will not sustain a verdict finding that by reason of the defects the engine was damaged to the extent of \$1,000.

Action in the district court for Martin county to recover \$731.55 and interest on three promissory notes made by defendant John Mosloski, payment of which was guarantied by defendant Katy Mosloski. Defendant John Mosloski set up a counterclaim for \$2,500. The case was tried before Quinn, J., and a jury, which rendered a verdict in favor of defendants, and assessed the damages of defendant John Mosloski at \$1,000. From an order denying a motion for a new trial, plaintiff appealed. Reversed.

Voreis & Mathwig, for appellant.

H. H. Dunn, for respondents.

CANTY, J.

On July 25, 1896, the defendant John Mosloski bought of plaintiff a 16-horse power engine, which was delivered to him August 3, of that year. Thereafter, until September 25, he used it in threshing, in connection with a separator which he then owned, and on the latter date the separator was burned. Thereupon he purchased from plaintiff a new separator and stacker, which were delivered to him on or about October 5 of that year, and he used the same in connection with the engine during the remainder of the threshing season of that year, and during the threshing season of the year 1897. The price of the engine was \$1,745. Mosloski traded for it an old engine and separator owned by him, and valued at \$750, and agreed to pay the sum of \$1,000 besides for the new engine. For the new separator and stacker he agreed to pay \$775. For these last two sums he gave to plaintiff his promissory notes, falling due thereafter at various dates. In November, 1897, this action was brought on several of these notes, which were then due, aggregating \$731, and on a written guaranty of payment of the notes, made by the defendant Katy Mosloski. The defendants, in their answer, set up an oral warranty of the engine and another of the separator and stacker, made by plaintiff to John Mosloski, and breaches of these warranties. On the trial the jury found for defendants, and awarded John Mosloski the sum of \$1,000 damages. From an order denying a new trial, plaintiff appeals.

We are of the opinion that the damages are wholly excessive and unreasonable, and that for this reason there should be a new trial as to both defendants. It will be observed that the jury awarded damages to the amount of more than \$1,730 for the breach of said warranties. John Mosloski and several of his witnesses testified that the separator and stacker were each constantly getting out of order, could not be made to do good work, and were wholly worthless. We cannot take the time or space to recite this evidence in detail. The evidence that the separator and stacker were wholly worthless is very unsatisfactory. The testimony was all that of farmers and farm hands who ran a threshing machine during the threshing season each year. No mechanical expert in that line ever examined the machine while in operation, or testified as to the nature or extent of the alleged defects, or as to whether the same could be remedied, or, if so, the cost of remedying the same. But conceding, without deciding, that the evidence was sufficient to sustain a finding that the separator and stacker were worthless, we are of the opinion that the evidence will not sustain a finding that the engine was as nearly worthless as the jury must have found it to be. As we have seen, the jury must have allowed about \$1,000 damages for breach of warranty of the engine.

Mosloski and several of his witnesses testified that the ball and socket joint which connects the boiler and the front axle together (and on which one end of the boiler rests) were defective, and broke in passing over a dead furrow in moving the engine. But this was remedied by procuring from plaintiff a new casting, the cost of which to Mosloski does not appear. They also testified that one end of the wooden jacket which covered the boiler extended slightly out over the fire box, and caught fire on two or three different occasions. But it does not appear that this could not have been remedied at small cost by cutting off a part of the end of the wooden jacket. They also testified that there was too much weight on the front axle of the engine, and that the fire box had such a draft that the straw used for fuel would be drawn up through the flues and the smokestack. They also testified that the pump, injector, and lubricator did not work; that the eccentric got out of order; that the cylinder got dry, and they had to stop the engine to oil a

certain place. No expert mechanical engineer examined the engine, or testified as to the character of its defects, or as to whether or not they could be remedied, and, if so, the cost of remedying the same.

True, Mosloski and one of his witnesses each testified that he was licensed to run a threshing-machine engine, but that does not imply that he knew anything about repairing or altering a defective engine; and neither of them testified that he did. Mosloski testified that the engine is worthless. He is a farmer, and it is evident from his evidence that he knew very little about such a steam engine, either theoretically or practically. Such an engine is a complicated machine, and it requires considerable mechanical skill to determine the extent and character of the defects which may exist in it. Mosloski may have carried a watch for years, and used and wound it every day, and, if it got out of order, he would be nearly as competent to testify to the character and extent of the defects in the watch as he was to testify to the character and extent of the defects in this engine.

We do not wish to be understood as holding that the evidence given by these witnesses was not competent to prove some amount of damage to the engine. The mere fact that the defects existed was evidence of damage to some extent, but not to the extent of \$1,000, without proof that it would cost that amount to remedy these defects, or that they could not be remedied; and these witnesses were not competent to prove any of these facts. If the warranty proved by defendants required plaintiff to remedy the defects in the engine on being notified that such defects existed, and such notice was given and plaintiff failed to remedy them, it might be evidence that the defects could not be remedied, and from this it might appear that the machine was worthless. But the warranty proved by defendants did not require any such notice, or give plaintiff any opportunity to remedy the defects. It was, by its terms, simply a warranty that the engine was made of good material, and would work well. We find no other error in the record.

The order appealed from is reversed, and a new trial granted.

ROBERT B. COLEMAN v. RETAIL LUMBERMEN'S INSURANCE
ASSOCIATION.77 31
52LRA721n

June 14, 1899.

Nos. 11,628—(174).

Insurance Policy—Warranty—Laws 1895, c. 175, § 52.

Laws 1895, c. 175, § 52, provides: "In all insurance against loss by fire the conditions of insurance shall be stated in full, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty or a part of the contract, except so far as they are incorporated in full into the policy." *Held*, by reason of this section, the description of the property insured, or the location thereof, as found in the application (not made a part of the policy), does not limit the description stated in the policy.

Account Books Admissible in Evidence.

Held, where accounts between a party to the action and third parties are material evidence, his books containing such accounts are admissible in evidence when proved by such party in the manner provided by G. S. 1894, § 5738.

Secondary Evidence.

Rule applied that secondary or less satisfactory evidence is admissible where better evidence is not obtainable.

Action in the district court for Hennepin county to recover \$1,372.21 on a policy of insurance. The case was tried before Johnson, J., and a jury, which rendered a verdict in favor of plaintiff for \$820.60; and from an order, Brooks, J., denying a motion for a new trial, defendant appealed. Affirmed.

Russell, Cray & Jamison, for appellant.

E. J. Scofield, for respondent.

CANTY, J.

Plaintiff owned a lumber yard at Elbow Lake, Minnesota, where he conducted a retail lumber business. On August 11, 1896, the defendant insurance company issued to him its policy of insurance insuring him against loss of his lumber by fire in a sum not exceeding \$3,000. Thereafter, on August 27 of that year, a fire occurred, resulting in loss to him by the burning of his lumber, and this ac-

tion is brought on the policy to recover for the same. On the trial, plaintiff recovered a verdict for \$820.60, and from an order denying a new trial defendant appeals.

1. Before the policy was issued plaintiff signed and delivered to defendant a written application for the same. The policy refers to this application, and declares that it forms a part of the policy and of the contract between the parties, but neither the application nor a copy thereof was ever attached to the policy or incorporated in it. There is a plat or "survey" on the back of the application which purported to define the limits of the lumber yard. Appellant claims that two car loads of the lumber on which loss is claimed were burned outside of these limits. This lumber is covered by the language of the policy itself, which purports to insure plaintiff's lumber "while situate on right of way of Great Northern Railroad in Elbow Lake, Grant county, Minnesota." The application also contained a warranty that the average value of the stock carried by plaintiff was \$3,700, and appellant claims that this warranty is false, and that, therefore, plaintiff is not entitled to recover. This warranty is not incorporated in the policy. Plaintiff offered the policy in evidence without offering the application. Appellant objected because the application was not also offered, and the overruling of this objection is assigned as error.

In order to dispose of these different questions it is necessary to determine the effect of Laws 1895, c. 175, § 52, which is quoted in the syllabus. We are of the opinion that by virtue of this section the application was not "a part of the contract except so far as * * * incorporated into the policy," and that this applies as well to matters of description of the property insured, or the location of the same, as to warranties and other conditions found in the application, but not incorporated in the policy. By virtue of this section, the policy alone is the contract, and we hold against appellant on all of the questions thus raised. But, while the warranty in the application cannot be regarded as a part of the contract, it was still competent evidence on the issue of fraud, and appellant was entitled to introduce the application in evidence, as appellant did do, for the purpose of showing that plaintiff made false representations which it claims induced it to issue the policy.

2. For the purpose of proving the amount of lumber on hand just prior to the fire, plaintiff proved the amount on hand on January 1, 1896, when an inventory of the stock on hand was taken. He then proved his books of account in the manner provided by G. S. 1894, § 5738, and introduced them in evidence for the purpose of showing the amount of lumber since purchased and the amount since sold, in much the same manner as that described in *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855. Appellant objected to the offer of the books in evidence on the ground that no foundation was laid for their introduction, and assigns the overruling of the objection as error. Appellant contends that section 5738 applies only to cases where the account purports to be one between the parties to the action; that the accounts in these books purport to be between plaintiff and various third parties with whom he dealt; and that, therefore, if the books are admissible at all, it is only after they have been proved in the manner provided by the common law, and that proof under the statute is not sufficient in such a case. Said section 5738 reads as follows:

"Whenever a party in any cause or proceeding produces at the trial his account books, and proves that said books are his books of account kept for that purpose, that they contain the original entries of charges for moneys paid, or goods or other articles delivered, or work and labor or other services performed, or materials furnished; that the charges therein were made at the time of the transactions therein entered; that they were in the handwriting of some person authorized to make charges in said books, and are just and true as the person making such proof verily believes, the witness by whom said books are sought to be proved being subject to all the rules of cross-examination, and said books subject to all just exceptions as to their credibility, said books shall be received as prima facie evidence of the charges therein contained."

The books here offered were the books of a party to the cause. "They contain the original entries of charges for moneys paid" (to or by such party) "or goods or other articles delivered" (to or by such party). The application of the statute is not expressly or by fair implication limited to cases where the charges so made and the accounts so kept are between both parties or between all parties to the action, and we cannot hold that such is the proper con-

struction of the statute. There is a conflict of authority as to when and how far, independent of any statute, the books of third persons are admissible in evidence. See 9 Am. & Eng. Enc. (2d Ed.) 932, 937, and notes. But that question is not now before us. This case comes within the statute. It would seem that this court came to the same conclusion in *Winslow v. Dakota Lumber Co.*, 32 Minn. 237, 20 N. W. 145, where the plaintiff claimed that he delivered goods to one Thompson on the promise of the defendant to pay for them, and it was held that plaintiff's books in which he charged the goods to Thompson were admissible in evidence.

3. The trial court did not err in permitting plaintiff, when testifying in his own behalf, to state as best he could the amount and quality of the lumber in the cars that were burned. So far as appears, no better evidence of the contents of the cars was obtainable. Neither did the court err in permitting the witness Norgaard to testify to the total value of the lumber remaining after the fire, as shown by the last inventory taken immediately after the fire. True, the witness could not remember the items entered in the inventory, or the value of each item, but he himself prepared the inventory, and testified that he knew it was correct. This disposes of the case.

Order affirmed.

HELEN M. MESSENGER v. St. PAUL CITY RAILWAY COMPANY
and Another.

June 14, 1899.

Nos. 11,647—(163).

Street Railway—Joint Operation of Line—Both Companies Liable.

On the evidence, *held*, that the St. Paul City Railway Company and the Minneapolis Street Railway Company were jointly operating the Inter-urban Line, partly owned by each, and connecting the two cities, and each one is liable for the acts and omissions of the other in operating the same.

Evidence Improbable—New Trial—Discretion of Court.

Held, the uncorroborated evidence of the plaintiff on the vital and es-

77	34
480	313
77	34
82	21

sentia] point in the case is so inherently unreasonable and improbable that the trial court abused its discretion in failing to grant a new trial.

Action in the district court for Ramsey county against the St. Paul City Railway Company and the Twin City Rapid Transit Company to recover \$9,000 damages for personal injuries. The case was tried before Bunn, J., and a jury. On motion of defendant the case was dismissed against the Twin City Rapid Transit Company. The jury rendered a verdict in favor of plaintiff for \$875; and from an order denying a motion for judgment notwithstanding the verdict, or for a new trial, defendant appealed. Reversed.

Munn & Thygeson, for appellant.

Stringer & Seymour, for respondent.

CANTY, J.¹

The corporate limits of Minneapolis and St. Paul join. A street-railway line extends from the business center of one city to the business center of the other, known as the "Interurban Line." This line is nearly ten miles long; a little less than three miles of it being within the corporate limits of Minneapolis, and the other seven miles within the corporate limits of St. Paul. The part in Minneapolis is owned by the Minneapolis Street Railway Company, and the part in St. Paul by the St. Paul City Railway Company. Each company procured its franchise from the city in which its part of the line is situated. The street cars run through from one end of the line to the other without change, and two fares, of five cents each, are charged for the through trip. One of these fares is collected in Minneapolis, and the other in St. Paul. There is another corporation known as the Twin City Rapid Transit Company, which owns and holds in its own name 98 per cent. of the capital stock of each of the other two companies, but takes no part in the actual management or operation of any of the properties or lines of either. This was the condition on October 16, 1897, when plaintiff boarded an Interurban car in St. Paul for the purpose of riding through to Minneapolis. She paid the two fares at the proper time, was injured in leaving the car at her destination in

¹ COLLINS, J., absent. BUCK, J., did not vote.

Minneapolis, by reason, as she claims, of the negligence of the employees operating the car, and brought this action against the St. Paul Company and the Rapid Transit Company to recover damages for such negligence. On the trial the court dismissed the action as to the Rapid Transit Company, and plaintiff had a verdict against the St. Paul Company, and from an order denying a new trial the latter appeals.

1. Appellant contends that the Minneapolis Company and the St. Paul Company were each operating its part of the line merely as a connecting carrier, and the St. Paul Company is not liable for negligence on the part of the line in Minneapolis resulting in injury to a passenger on that part of the line. On the other hand, respondent contends that the two companies were operating the whole line as partners, or, at least, under such arrangements as made them jointly liable, each for the acts of the other. In our opinion, the latter contention is the correct one, or at least the jury were warranted in so finding. Besides the facts above stated, it appears from the evidence that the two companies own the cars jointly, each having a half interest therein. The cars are run through from one terminus to the other by the same conductors and motormen, who receive their wages, one-half from each company. On one side of each car are the words, "Minneapolis and St. Paul;" on the other side, "St. Paul and Minneapolis;" on the front of each, the word, "Interurban." The St. Paul Company takes the five-cent fare collected in St. Paul, and the Minneapolis Company the five-cent fare collected in Minneapolis. Snelling avenue is three miles east of the line dividing the two cities, and a passenger may take a car at any point west of that avenue and ride through to Minneapolis for one fare of five cents, all of which is credited to the Minneapolis Company, although three miles of the ride may be over that part of the line owned by the St. Paul Company.

On this evidence, we are of the opinion that the jury were warranted in finding that the two companies were operating the line jointly in such a manner as to make one liable for the acts and omissions of the other. See Hutchinson, Carr. (2d Ed.) §§ 158-162a.

2. But we are of the opinion that plaintiff's uncorroborated testimony as to the manner in which she was injured is, in itself, so un-

reasonable and improbable that the trial court abused its discretion in refusing to grant a new trial.

Plaintiff testified: That she desired to leave the car at Pleasant avenue in Minneapolis. That, as the car approached that avenue, she signaled the conductor to stop the car, which he did. That she carried a satchel, a bag, and an umbrella, and with these in her hands she went down the aisle to the rear of the car. As she came down the aisle, she was afraid she was going to get hurt. She put her hand on the railing, and as she was about to step from the platform down onto the first step, to get off, some one called out: "All right. Go ahead." She drew her foot back, and just then the car started forward, and she was thrown off sideways from the platform, clear over the steps and through the open gates, and beyond them onto the ground, a distance of about four feet to one side, and more than three feet downward. She landed on her feet in the mud, and then fell on her knees in the mud,. She never touched the steps as she passed over them, and never touched the ground until she reached the place where she came down on both feet, outside of the open gates. During this time the conductor stood in the middle of the car. It is not claimed that any motion whatever was imparted to the car, except that of starting quickly forward. It is not claimed that any one pushed her off the platform, or that she jumped off or stumbled off, but still she went out "as if shot out of a gun." She testified:

"I got up and walked as rapidly as I could—because I had a feeling I was afraid I was going to get hurt—to the end of the car. * * * I took hold of the brass rod that was on the end of the car, and I went to look to be careful to get my foot right going down, and just before I reached that step someone hollered out: 'All right. Go ahead.' And that frightened me, and I went to pull my foot back; but before I could get my foot back the car started very swiftly, as it naturally would when the brakes were loosened there, and I went out,—well, so quick that, if I was shot from a gun, I couldn't have gone faster. But I struck on my toes, like, and I went forward onto my knees, I judge. I never knew from the time I struck my feet until afterwards, but my dress— I struck in a mudhole,—quite a deep mudhole,—and my dress was covered all over my knees with mud; and I couldn't clean it off, nor my people couldn't, and I had to send it to a cleaner and have it cleaned. So I think I struck on my feet, and that is the reason I never had any

feeling, much, in my toes since. Q. You struck on your feet. Then how did you go? A. Front onto my knees, because my dress was covered with mud so, and the mud was above my shoe tops and probably about so far (indicating) on my stocking. It was a deep mudhole. If it hadn't been for that I wouldn't be here to-day. Q. How far was it, Mrs. Messenger, from the platform to the ground? A. I don't know the height of those cars, but I should think it was four or five feet. I don't know how high they are from the ground. I never measured them. They are pretty high. Q. When you fell on the ground, where were you standing? A. I went straight from that side,—on this left side,—right over the steps, and struck the ground. Q. The side of what? A. Of where we go down the steps. Q. The platform? A. Of the platform. I was nearest to the car,—nearer the car than I was on the right side, you know; and this gate— I saw the gate coming, and I thought—didn't think much—I was afraid it would hit me; and it picked this umbrella off from my arm, and it stuck in the gate; and I don't know what made me, but that umbrella worried me so after I— There was a boy tried to lift me up, that clerked in the store there,—I come to, then, when he was trying to lift me up,—and he couldn't carry me. * * * I went straight out clear over the steps. Q. You didn't jump out, did you? A. No; I guess not. Q. You are quite sure about that? * * * A. I am very sure. That is the last thing I would attempt to do,—to jump off a car. Q. I suppose so. I haven't any doubt about it at all. You are sure you didn't jump out? A. I was thrown out,—just as straight and as swift as though I had been shot from a gun. Q. Did you strike the gates at all? A. The left gate struck me. Q. The left gate struck you? A. On my left side. Q. As you were going out? A. Yes; and took this umbrella off from my arm, and it hung on the gate, and the conductor got it and brought it to me; and, if you want to know the swiftness, here was a little place turned up, then those are round wires on that gate, and it cut that edge and that broke it. If you want to look at it, you can. Q. And is that the umbrella? A. That is the umbrella. I kept it on purpose to show the speed. Q. Did you see the umbrella on the gate? A. Yes, sir; when they were carrying me, I looked towards the car,—when they were carrying me in the store,—and I saw the umbrella— Q. Hanging on the gate? A. Yes. * * * Q. When they picked you up you looked down towards the car, and you saw your umbrella hanging on the gate? A. Yes. Q. Which gate was it hanging on? A. On the one on the left side. Q. You saw that, did you? A. I didn't think about that, but I saw the umbrella was there, but I know that the left-hand gate picked it off of my arm. Q. And you saw it hanging on the left-hand gate? A. I saw it hanging on the gate of the car. I could see my umbrella was there, and I told the conductor— Q. You saw that, did you? A. Yes, sir; and it wor-

ried me all the time about the umbrella— Q. Why were you worried about it when you saw it hanging there? A. Well, I tell you I thought it was a providence, to show the speed I was thrown off. That shows the speed— Q. That worried you. You said you worried about it. What worried you? A. Well, I wanted to get it. Q. Then you were not thinking about your injuries, but about the umbrella? A. That umbrella was in my mind very distinctly. It is a very curious thing, but it was. Q. And you were worried about it all the time? A. No; I didn't say I was worried about it all the time. I wanted it, and I asked the conductor to bring it to me, and he did. * * * After I got in the store, I said: 'My umbrella is hanging on the gate. You bring it to me.' * * * Q. Now, the left-hand gate, you say, struck your left arm? A. Yes. Q. And that is the only thing that did strike you? A. That I knew of. * * * I was going down, and that umbrella was on my arm, and the gate picked that off my arm; and, of course, I fell away and left it. I was going down, and naturally my arm would pull down. Q. Just slipped out from under it, and left it hanging on the gate? A. It will do it. If you want to try it, you can do so. Q. You didn't touch the step, then, did you? A. I don't think I did. I went into a mudhole outside of the track. Q. Did you realize when the gates were shut? A. The gates were shutting as I was going down. You understand it was but an instant. I can't tell you every motion that is made. Q. The gates were closing as you were going out? A. As I was going out. Q. And yet you didn't touch either one of them, except to hit the left arm? A. The left one. The other gate, you know, I was farther from, and I had that satchel on my side. Whether it hit the satchel or not, I don't know. I never saw any marks on it, and I did not feel the right-hand gate touch me, but I did the left."

The right-hand gate is the rear gate, and, if she had not landed clear outside the gates, that gate must have struck her as the car moved along and the gate was swung in in closing it. She testified that this gate may have struck her, for the reason that she immediately, and for a long time afterwards, had a sore spot on her back, between her shoulders, along her spine. As to the character of her injuries she further testified:

"It was a wrench, and it affected me all over, and when I turned my head it seemed to me that my brain settled down whichever way I turned my head, as though it was loose in the skull; but I got over that in three or four weeks, so that I didn't feel that way when I moved my head. I got a terrible jar and strain. Q. How long did you remain in bed? A. Three weeks. And then they lifted me up, and put pillows in a chair, and put me in a rocking chair. Q.

Now tell the jury about that. Were you able to get up before the expiration of three weeks? A. Oh, no; I couldn't get up alone at the end of three weeks. Q. Where did you suffer the greatest pain during the three weeks? A. Oh, dear! Q. What's that? A. If any one tried it, they could tell; but it is hard to tell it to any one else, when you are hurt all over like that. Q. Well, are you able to tell the jury whether in any one part you experienced more pain than any other part? A. Well, the sorest places was low down on my back, below the kidneys, quite a ways, and up between my shoulders, where I think the corner of the gate must have hit me, right in the side of my backbone, and then it affects my lungs (coughing), and keeps me coughing whenever I am tired or whenever I talk long yet. My back here (indicating) I don't feel it, nor I don't feel it here; but right in here, Dr. Alger says he found a place, and he put his two fingers there, and it hurt me terribly, where it was injured. * * * Q. You say that has hurt you to this day? A. Yes, sir. Q. Continuously? A. Continuously. Never has stopped being sore and hurting. * * * I didn't go out of doors, I guess, for 11 weeks."

Dr. Alger was called as a witness by plaintiff, and he testified as follows:

"Q. State to the jury what condition you found her [plaintiff] in the first time you called to see her? A. It was directly after the accident. She was in a nervous—very nervous—condition. Complained of pain in her side, of an injury in the side, and of the limbs. I made a thorough examination. There was no external showing of any trouble whatever. I think on the right leg, if I remember rightly, there was a little scratch or bruise; but, so far as the side was concerned, there was nothing visible. She complained of this pain, and, of course, was under great excitement at the time. I gave her, I think, Nervine. I didn't think she was in sufficient pain to give her a narcotic, so I gave her simply Nervine, as I recollect it, and then left it, if they needed me further, to call me. This was the first night. Q. Did she complain of her back? A. Yes, sir; complained of wrenching through the left side; well, from just below the ribs clear down through the side. Q. Was she in bed or not? A. Yes; she was lying down in the bed. Q. What was her temperature? A. Her temperature was normal at that time, or nearly so. I would not say that I took her temperature. Q. How about her feet and hands? A. Well, they were cold, but that was from the effect of the shock. I saw she was under excitement. Q. You say that her hands and feet were cold from the effect of a shock? A. Probably; that would be a natural occurrence. Q. That is what you would expect to be the cause of it? A. Certainly."

He testified that he called three or four days later, and found her somewhat better. He did not see her again for seven or eight months. In July, 1898, she was examined and treated by Dr. Sweeney, who testified on her behalf that he then found her suffering with diabetes. He testified that the cause of diabetes is not always known; that it might be caused by injuries to the head, or by general concussion; that her injury might be the cause of her condition; that he would not necessarily attribute the diabetes to her injury; that the diabetes might be caused by old age.

Plaintiff's evidence as to the manner in which she left the car is wholly uncorroborated.

Defendant called three witnesses, apparently disinterested, who testified that they were passengers on the same car. One stood on the platform, and the other two sat on the rear seats, one on each side of the aisle. They testified that the plaintiff walked down the steps, and was upon the ground when the signal was given to start the car. No one of them saw her afterwards until some one shouted to stop the car; that the woman had fallen down. She was then in the mud, but how she came there they could not tell.

Plaintiff was then a widow, 66 years old. She testified that she was a pension agent; a real-estate agent; collected pensions and rents, and looked after estates for other people. The jury gave her a verdict for \$875.

We cannot say that defendant was not guilty of negligence which might have caused or contributed to her injury, if it appeared by some half-credible evidence just how she was injured. But, if we reject the part of plaintiff's story which is highly improbable, there is not enough left on which to sustain a verdict. It is highly improbable that she was thrown from the platform of the car out onto the ground in the manner which she testifies. Reject this part of her evidence, and we have the simple fact that, after leaving the car and landing on the ground, she either fell down or was thrown down. This alone will not support the verdict. She alone can tell just how she fell down or was thrown down, but she refuses to tell, except as she tells something which is highly improbable. If she had since died by reason of injuries then received, and the action was brought by her personal representatives, her mouth would be

closed, and the circumstantial evidence in the case would then be given great weight, and might perhaps be sufficient to sustain a verdict against defendant. But she is not dead. She is living, and able to testify, and her statement as to how she was thrown from the car negatives any and all inferences which otherwise might be drawn as to how the injury occurred. Her case rests upon the assumption of the absolute verity of her statement. For this reason the mere proof that she fell down or was thrown down and injured immediately after leaving the car would not, in the absence of an explanation from her as to how it happened, support a verdict in her favor. She makes an explanation as to how it happened, but her explanation is highly improbable.

We cannot say there is not some evidence to support the verdict. But her uncorroborated evidence on the essential and vital point in the case is so inherently improbable and unreasonable that in our opinion the trial court abused its discretion in refusing to set aside the verdict, and grant a new trial. See *Voge v. Penney*, 74 Minn. 525, 77 N. W. 423. This rule can be applied by this court only in extreme cases. But when such a case is presented the court should not hesitate to act. The court which refuses to do anything to correct the abuses of the jury system is one of the worst enemies of that institution. Such a court is doing what it can to pave the way for the abolition of the jury system, the establishment of "government by injunction," and the establishment of a one-man system, in which the judge who acts as a jury will be altogether too liable to be selected, controlled, or influenced by great corporations and by men of great wealth or political influence.

Order reversed and a new trial granted.

FIRST NATIONAL BANK OF DETROIT v. BOARD OF COUNTY COMMISSIONERS OF BELTRAMI COUNTY.

77	48
181	96

June 19, 1899.

Nos. 11,538—(79).

Unorganized County—Indebtedness.

An organized county has no power to create an indebtedness against an unorganized county, attached to it for judicial and other purposes, which will be a valid obligation or indebtedness against the latter county as a municipality, when it thereafter comes into being by organization.

Action in the district court for Ramsey county to recover \$7,757.56 on orders drawn by the treasurer of Becker county payable out of money in the treasury of Beltrami county not otherwise appropriated. From an order, Otis, J., sustaining a demurrer to the complaint, plaintiff appealed. Affirmed.

C. D. & Thos. D. O'Brien, for appellant.

W. F. Street, County Attorney, and *Owen Morris*, for respondent.

MITCHELL, J.

The county of Beltrami, being an "established," but not an "organized," county, was, by Sp. Laws 1871, c. 75, annexed to Becker county for judicial and record purposes, and so continued until May, 1897, when it became an organized county. As to the status of "established" counties in this state, and their relation to the organized counties to which they are attached for judicial and other purposes, see *State v. McFadden*, 23 Minn. 40; *State v. Parker*, 25 Minn. 215; *Smith v. Anderson*, 33 Minn. 25, 21 N. W. 841. "Establishing" a county is merely the setting apart of certain territory to be in the future organized as a municipal corporation or quasi corporation for political purposes, while "organizing" a county is the vesting of the people of such territory with such corporate rights and powers. The statute provides that every county, whether organized or unorganized, shall have a board of county commissioners, which is given certain limited powers, as, for example, to establish school districts, organize road districts, etc. G. S. 1894, §§ 657, 702 et seq. But this does not constitute

the "established" county an "organized" county, or a quasi municipal corporation, or vest its inhabitants with any corporate rights or powers, except to the limited extent thereby expressly provided. *State v. Parker, supra*; *Smith v. Anderson, supra*. Except as thus otherwise provided, the "established" county is merely territory set apart for a future, and not as a present, county, but which, until it becomes organized, is to be governed, as respects county matters, by the officers of the organized county to which it is attached.

This action was brought against Beltrami county on a large number of orders drawn by the auditor of Becker county on the treasurer of that county, payable "out of the money in the treasury of Beltrami county not otherwise appropriated." These orders were issued from 1891 to 1897, while Beltrami was still merely an "established" county attached to Becker county. The complaint, after alleging the execution of these orders, further alleges that they were each and all

"Issued for services rendered to the said country of Beltrami, and for salaries due by the said county of Beltrami for the services rendered and described and referred to in each of said causes of action, and that each and all of said orders so described in each of the foregoing causes of action, at the time of the issuance of the same, constituted and were valid, legal claims and demands against the said county of Beltrami";

Also that payment was demanded of the treasurer of Becker county, as ex officio treasurer of Beltrami county, while the latter county was still unorganized, and to its treasurer after its organization, but that payment was refused. The relief asked is for a money judgment for the amount of the orders and interest against Beltrami county.

The trial judge sustained a general demurrer to the complaint for the reasons, as stated in his memorandum, that the contracts set out in the complaint, at the time they were made, were, if binding at all, obligations of Becker county, for at that time the county of Beltrami had no corporate existence, and for taxable purposes was a part of Becker county; that, after defendant's incorporation, it never assumed this indebtedness or obligation of payment, nor was it imposed upon defendant by legislation.

Without stopping to consider whether all the reasons given by the learned judge are strictly correct, we are satisfied that his conclusion was correct, and was placed substantially on the right ground. The real question presented is whether, while an unorganized or "established" county is thus attached to an organized county, the organized county can create an indebtedness, for purposes which, as between the two counties, should be a charge against the property in the unorganized county, which will become and be a valid claim or indebtedness against the latter as a quasi corporation, when it comes into actual being by organization.

Counsel for the defendant cite numerous cases, among others *State v. City of Lake City & Town of Lake*, 25 Minn. 404, and *City of Winona v. School District No. 82, Winona Co.*, 40 Minn. 13, 41 N. W. 539, to the familiar proposition that, upon the division of a municipality by the creation of a new one out of part of its territory, the old corporation is liable for and must pay all the corporate indebtedness, and that the new corporation will not be liable for any part of it, unless otherwise provided by statute. These authorities are not in point. The county of Beltrami was not created out of the territory of the county of Becker. The territory composing the former never was, in any proper sense, a part of the latter. It was merely temporarily attached to it, for certain political or governmental purposes.

The legislation defining and regulating the relations of an organized county to an unorganized county attached to it, and the rights, liabilities, and remedies of the one against the other, or of third parties against either, is apparently very incomplete, or, at least, indefinite. The only statute we can find bearing upon the question now in hand is G. S. 1894, § 1665, which reads as follows:

"That hereafter taxes shall be levied and collected in all unorganized counties in this state, by the counties to which they may be attached for judicial and record purposes, only for state purposes, for the payment of the principal and interest of any legal indebtedness of such unorganized counties, and a reasonable sum per annum as compensation for the county to which such unorganized counties are attached; provided, that such annual compensation for the levy and collection of taxes, and for all other expenses, shall not exceed the aggregate sum of 10 mills per acre of

land subject to taxation in such unorganized counties, the amount of said compensation to be extended uniformly upon the taxable property of such counties according to the assessed valuation thereof."

Laws 1853, c. 11, § 15, cited by counsel, was expressly repealed by G. S. 1866, c. 122.

Plaintiff's counsel contend that inasmuch as section 1665 authorizes an organized county to levy taxes in an unorganized county attached to it, for the payment of the indebtedness of the latter, therefore it follows, by implication, that the organized county can create an indebtedness against the unorganized county. The inference is not justifiable.

It does not follow from the fact that such indebtedness may, under some circumstances, exist, that, therefore, the organized county has the power to create it. An organized county which has incurred indebtedness may be thereafter disorganized and attached to some other county. Such was the fact in the case of Cass county. Laws 1872, c. 79; Sp. Laws 1876, c. 208. Section 1665 clearly contemplates that an organized county is entitled to and shall receive a reasonable compensation for the extra expense of its county government resulting from the territory of an unorganized county being attached to it. It also provides a method by which it may obtain compensation, to wit, by levying an annual tax for that purpose on the taxable property in the unorganized county, but not to exceed 10 mills per acre.

Whether the organized county is absolutely liable for all the expenses incurred on account of the attached county, or whether, as to such expenses, it is merely accountable as trustee to the extent of the funds which it has received from a 10-mill tax levied on the unorganized county, and whether the 10-mill tax is the exclusive means of obtaining, and the limit of, the compensation to the organized county, and also what remedy, if any, there is against the unorganized county in favor of creditors holding claims incurred by the organized county on account of the former, are important, and, in view of the incomplete legislation on the subject, quite difficult, questions, upon which we are asked by counsel to express our opinion. But in view of the facts that Becker county is not repre-

sented in, or a party to, this action, and that these questions have not been argued by counsel to any extent, we would not feel justified in deciding more than is necessary to dispose of this appeal.

However, for the purpose of aiding counsel in future investigation of the subject, we will make a few suggestions. It seems to us very clear that the statute contemplates that the proper officers of the organized county are the persons whose duty and authority it is to apportion the expenses of county government between the two counties, and to determine what part of it is properly chargeable to the property in the unorganized county, and for that purpose they should keep proper accounts to show the facts; also that, if the organized county is merely liable as trustee, as above suggested, it no doubt could be compelled to account as such, and show how much it has received, and how much it has expended, on account of the unorganized county; also that, inasmuch as the amount of the tax, as limited by the statute, which may be levied in the unorganized county, might be very much less than its proportion of the expense of the county government, it is at least a serious question whether to hold that the organized county is absolutely liable for all the expenses incurred on account of the unorganized county, without regard to the amount of compensation or reimbursement which it had received, would not conflict with the constitutional requirement that taxation shall be uniform and equal; also that, if creditors holding claims like those held by the plaintiff have any remedy against the unorganized county after it becomes organized, it must be by mandamus, to compel the county commissioners to continue the levy of the 10-mill tax on the property within its limits for the purpose of paying the claims. The powers of counties, like other municipalities, are strictly and purely statutory, and we can find no authority in any statute for an organized county creating an indebtedness against an unorganized or "established" county (which is therefore not yet in being as a legal entity) which will be a debt or obligation against the county as such when it comes into being in the future, as a quasi municipal corporation. That disposes of the case, and the order sustaining the demurrer must be affirmed.

In conclusion, we may suggest that the difficulties surrounding

this subject mainly grow out of the limitation on the amount of tax which can be levied on property in the unorganized county to compensate the organized county to which it is attached,—a limitation which was undoubtedly inserted for the benefit of landowners in unorganized counties.

Order affirmed

JULIA A. WEBBER v. JOHN G. HAUSLER and Others.

June 19, 1899.

Nos. 11,567—(163).

Mortgage Loan upon Agent's Land—Payment of Prior Mortgage with Principal's Money—Subrogation.

W. intrusted to K. \$1,000, to be loaned for him on a first mortgage on real estate. K., for the purpose of lending the money to himself without the knowledge of his principal, procured H. to execute to W. a note for \$1,000 and a collateral mortgage on land owned by K., on which there was a prior mortgage for \$1,000 to C., and then transmitted the note and mortgage to W., representing to him that it was a first mortgage, and that H. had good title to the land. It was the intention and purpose of both H. and K. that the mortgage to W. should be a first mortgage, and, to that end, that before it was executed K. should convey the land to H., and that W.'s \$1,000 should be applied in payment of C.'s mortgage; but by inadvertence and oversight of the parties no such conveyance was ever executed. K. had deposited W.'s \$1,000 in his own name in a bank in which he had an account, and afterwards checked out and used in his business all the funds deposited in that bank. K. paid C.'s mortgage by a check on another bank, in which he also kept an account. This mortgage, although paid, was never satisfied of record. K. subsequently made a general assignment for the benefit of creditors to the defendants. W.'s mortgage was never paid. *Held* that, as against defendants, W. was entitled to be subrogated to all C.'s rights under the prior mortgage.

Same—Payment—Identical Coin.

Also that it was immaterial that K. did not pay that mortgage with the identical money which he received from W.

Action in the district court for Hennepin county by plaintiff as executrix of the will of Richard A. Webber, deceased, against John

G. Hausler, Charles M. Hanson and Albert C. Cobb, as assignees of A. F. & L. E. Kelley, insolvents, and others to have a mortgage declared a first lien and to be subrogated to the lien of a prior mortgage. The case was tried before Johnson, J., who found in favor of plaintiff; and from a judgment entered pursuant to the findings, defendant assignee appealed. Affirmed.

Cobb & Wheelwright, for appellant.

Hahn, Belden & Hawley, for respondent.

On the facts found Webber became subrogated to the rights of Cutting as against defendants. In legal effect his money paid off the Cutting mortgage, and such payment was made by Kelley acting as his agent, who was then obligated by his assumption of this mortgage to pay it. The payment cannot be held to be voluntary. *Farm v. Elsbree*, 55 Kan. 562; *Cotton v. Dacey*, 61 Fed. 481; *George v. Butler*, 16 Utah, 111; *Home v. Bierstadt*, 168 Ill. 618; *Reimler v. Pfingsten* (Md.) 28 Atl. 24; *Shaffer v. McCloskey*, 101 Cal. 576; *Irvine v. Board of Commrs. of Kearney Co.*, 75 Fed. 765; *Palmer v. Sharp*, 112 Mich. 420; *Milholland v. Tiffany*, 64 Md. 455.

MITCHELL, J.

The short facts are that in January, 1893, plaintiff's testate, Richard A. Webber, who resided in Vermont, sent to the firm of A. F. & L. E. Kelley, in Minneapolis, \$1,000, with instructions to invest the same for him in a first mortgage on real estate in Minnesota. At this time A. F. Kelley was the owner of a tract of land, subject to a mortgage for \$1,000 to one Cutting, which was of record and would mature in March, and which Kelley had assumed and agreed to pay when he purchased the land. As an investment for Webber's money, A. F. Kelley, in March, 1893, caused the defendant Hammond, under the assumed name of Hausler, to execute to Webber a note for \$1,000 and a collateral mortgage on the tract of land referred to, placed the mortgage on record, and then transmitted it and the note to Webber, representing to him that Hausler had perfect title to the land, and that the mortgage was a first lien upon it. Webber believed and relied upon their representations, and during his life never knew to the contrary. Both Kelley and

Hammond, alias Hausler, intended that before the mortgage was executed the former should convey the land to the latter; but through the inadvertence and oversight of the parties no such conveyance was ever executed. It was also the purpose and intention of both of them that this mortgage to Webber should be a first mortgage on the land, which, of course, could only be by satisfying and discharging the Cutting mortgage. While not important in this case, it is quite evident that Kelley's object in having Hammond, under the name of Hausler, execute the mortgage was to conceal from his principal that he was in fact lending the money to himself. In February following Kelley paid the Cutting mortgage, and obtained a release of it, which was placed among his papers, but never put on record, so that the mortgage continued to appear of record as a subsisting lien on the land. Thus far the facts are stipulated and undisputed. With matters standing in this condition, on September 12, 1896, the Kelleys executed to the defendants a general assignment for the benefit of creditors.

The plaintiff, executrix of the last will of Webber, having discovered the condition of the title to the land, and particularly that Hammond, alias Hausler, never had any title to it, and the mortgage to Webber being unpaid, brought this action, asking to have it adjudged that she be subrogated to the rights of Cutting under his mortgage, and that she had a lien on the land to the amount of the Cutting mortgage. The ground on which she claims the right of subrogation is that it was Webber as second mortgagee who had paid the Cutting mortgage, or at least that it was his funds which he had loaned on a supposed second mortgage with which it was paid. If Webber in person, supposing that his mortgage was a valid lien on the land, had paid the Cutting mortgage, or if Kelley as his agent had paid it with the identical money intrusted to him by Webber, there could be no doubt of the right of plaintiff, as against the defendants, to be subrogated to all Cutting's rights under his mortgage. Indeed, we do not understand defendants' counsel to dispute this proposition.

The cases of *Robertson v. Rentz*, 71 Minn. 489, 74 N. W. 133, and *Perkins v. Hanson*, 71 Minn. 487, 74 N. W. 135, did not involve the question of subrogation, and hence are not in point.

The main contention of the defendants is that there was no right of subrogation, because it was not Webber's, but Kelley's, own money with which the latter paid the Cutting mortgage, and on that ground they assign as error the court's fifteenth finding as not supported by the evidence. This finding is as follows:

"That such use of said funds [Webber's \$1,000] by the said Kelleys was only temporary, and in the payment of the principal sum secured by the said Cutting mortgage, and the placing of the plaintiff's mortgage upon the said property, * * * it was the intention and purpose of the said Kelleys that the said funds should be, and they were, permanently used and applied to pay said principal sum of the said Cutting mortgage, and it was the intention and purpose of the said Kelleys that the plaintiff's mortgage to the extent of the amount thereof should take the place of the said Cutting mortgage."

To fully understand this finding, it is necessary to refer to the evidence as to certain facts which are the subject of the court's preceding finding. When the Kelleys received the \$1,000 from Webber, they deposited it to their own credit in the Vermont National Bank, in which they kept a bank account, and thereby commingled it with other funds belonging to themselves and to other persons, all of which funds were subsequently paid out by them by check in the usual course of their business for their own use. When the funds were thus used by them, whether before or after the payment of the Cutting mortgage, does not appear. When they came to pay the Cutting mortgage, they did so by a check upon another bank, in which they also kept an account. As already stated, the defendants had stipulated, and the court had accordingly found as a fact, that at the time of the transaction it was the intention of both Kelley and Hammond (or Hausler) that Webber's mortgage should be a first mortgage and a valid lien upon the land. A. F. Kelley also testified that the mortgage was made to Webber for \$1,000, on the same land that Cutting had a mortgage on, and that Cutting was paid the \$1,000, and Webber was charged (on Kelleys' books) with the loan of \$1,000; the plan being to give him (Webber) the same security as Cutting had.

"Q. Did you intend to pay that note and mortgage [Cutting's] in your own funds, so that you should carry that yourself, or it

should be carried by Mr. Webber? A. For a few days,—a short time. Q. But it was the intention, was it not, and the purpose, * * * that this Webber mortgage should take the place of the Cutting mortgage? A. Yes, sir. Q. Permanently? A. Yes, sir.”

A. F. Kelley, or his firm, had \$1,000 of Webber's money to invest on a first mortgage. He was lending it to himself (under the guise of a loan to Hausler), doubtless in violation of his duty as agent, although that is immaterial here. It was his legal and bounden duty to Webber to apply that \$1,000 to pay the prior mortgage belonging to Cutting. The evidence, direct and circumstantial, is ample to justify the conclusion that the purpose was that the Webber mortgage should be a substitute for the Cutting mortgage, and that the \$1,000 received from Webber should be applied in payment of the Cutting mortgage, and that this was what A. F. Kelley intended to do, and supposed he was doing, when he paid the Cutting mortgage. Under these circumstances, we are of opinion that it was wholly immaterial whether the Cutting mortgage was paid by Kelley with the identical money which his firm had received from Webber, or with some other money as a substitute for it. In contemplation of law it was paid by Webber and with his money. If so, then he or his estate is entitled to be subrogated to the rights of Cutting. The creditors of the Kelleys are not in position to claim that plaintiff is in anywise estopped, as against them, to assert this right of subrogation; for it will be recollected that the Cutting mortgage remained unsatisfied of record, and an apparent lien on the land for its full amount. For these reasons, we are of opinion that the plaintiff is entitled to the rights of subrogation which she claims.

Judgment affirmed.

LOUISA CUTTING v. GEORGE WEBER and Others.

June 19, 1899.

Nos. 11,680—(86).

Scheibel v. Anderson Followed.Scheibel v. Anderson, *infra*, page 54, followed.**Appeal—Points and Authorities—Argument upon Other Questions.**

This court will not consider any point not urged in appellant's points and authorities, at least unless both parties voluntarily discussed it, and submitted it to the decision of the court.

Action in the district court for Brown county to recover \$500 damages for trespass on land. The case was tried before Webber, J., who directed a verdict in favor of defendants; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Jos. A. Eckstein and Lind & Somsen, for appellant.

C. A. Hagberg and Somerville & Olsen, for respondents.

MITCHELL, J.

This action grew out of the same matters which were the subject of consideration in *Scheibel v. Anderson*, *infra*, page 54. After *Scheibel's* offer to redeem, having kept his tender good, he assumed to take possession of the premises, and sent the defendants upon the land as his servants to cultivate it. Thereupon the plaintiff, who had succeeded to *Schmidt's* rights under the foreclosure of the *Williamson* mortgage, sued the defendants for trespass. The points urged in plaintiff's brief are the same as those considered and decided in *Scheibel v. Anderson*. Therefore this case is controlled by that.

Upon the oral argument, plaintiff's counsel raised the additional point that, even if *Scheibel* was entitled to redeem, yet his offer to do so did not amount to an actual redemption, so as to divest plaintiff's title, and vest the title and right of possession in *Scheibel*. The record presents the point, and probably one of the assignments of error is sufficient to raise it. But, under our rules, we will not consider any point not made and urged in the printed points and

authorities. This is so, even if the point is made by the appellant in the oral argument, unless it is voluntarily discussed and submitted to the court by counsel for the respondent. Any other practice would be unfair to the respondent. We have examined appellant's points and authorities and printed brief, and find that the only points made or urged are the two which were urged and considered in *Scheibel v. Anderson*.

Order affirmed.

HENRY SCHEIBEL v. NELS ANDERSON.

June 19, 1899.

Nos. 11,683—(102).

Redemption as Creditor by Grantee of Absolute Deed—Judicial Decision.

A party having an equitable mortgage, in the form of an absolute conveyance or transfer of the land, may redeem as "a creditor having a lien," without having first obtained a judicial determination that the conveyance or transfer is a mortgage.

Action in the district court for Brown county against defendant as sheriff of said county to redeem from a mortgage foreclosure sale and to compel defendant to execute a certificate of redemption. The case was tried before Webber, J., who found in favor of plaintiff; and from a judgment entered pursuant to the findings, defendant appealed. Affirmed.

Jos. A. Eckstein and Lind & Somsen, for appellant

C. A. Hagberg and Somerville & Olsen, for respondent.

MITCHELL, J.

Action to compel the defendant, Anderson, as sheriff, to execute to the plaintiff a certificate of redemption from a mortgage foreclosure sale.

The undisputed facts are as follows: One Fortwengler, being the owner of the land in question, executed three successive mortgages upon it,—the first one to Aufderheide, in the form of an absolute deed to Aufderheide, accompanied by a contract by the latter to convey the land back to Fortwengler upon the payment of a speci-

77	54
177	53
77	54

77	54
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fled sum; the second to one Williamson, in ordinary form; and the third to the plaintiff, in the form of an assignment to him of Aufderheide's contract to reconvey. This assignment was absolute in form, but was intended merely as security for the payment of certain indebtedness of the assignor to the assignee. One Schmidt, being assignee of the Williamson mortgage, foreclosed it under a power, and bid in the property at the sale on November 27, 1896. On November 27, 1897, the plaintiff filed notice of his intention to redeem as a creditor having a lien under his equitable mortgage, to wit, the assignment from Fortwengler of Aufderheide's contract to convey. On November 24, 1897, in an action brought by some of Fortwengler's judgment creditors against him, Aufderheide, and plaintiff, judgment was rendered adjudging Fortwengler's assignment of Aufderheide's contract to reconvey to be merely a mortgage. The judgment roll was made up on that day, with a copy of the judgment attached, but the judgment was not in fact entered on the judgment book until December 3. On December 1, 1897, the plaintiff presented to defendant sheriff the required proofs of his right to redeem (including a copy of the judgment referred to), and tendered him the requisite amount of money, and demanded a certificate of redemption from the sale on the Williamson mortgage. The sheriff refused to receive the money or to execute a certificate of redemption.

There is nothing in the point that plaintiff's proofs should have included a copy of the deed from Fortwengler to Aufderheide. That deed constituted a part of the mortgage from Fortwengler to Aufderheide, but not of the mortgage from Fortwengler to the plaintiff.

Two objections are made to plaintiff's right to redeem: First, that, although he was in fact an equitable mortgagee, yet upon the face of the records, and upon the face of the assignment to him of the Aufderheide contract to convey, he appeared to be an owner of the premises, and not a creditor having a lien, and therefore he should have redeemed as owner within one year from the date of the sale; second, that, at the time of an attempted redemption, there was no judgment adjudging the assignment to him of the Aufderheide contract to be a mortgage; and in reference to this

last point we are asked to overrule *Clark v. Butts*, 73 Minn. 361, 76 N. W. 199.

We see no reason for overruling that case. On the contrary, subsequent observation and information has increased our conviction that that decision was not only sound in principle, but also founded on considerations of wise public policy, in shutting off an incipient, but extensive, branch of legal industry, which would otherwise have upset almost innumerable titles, where the property had gone into the hands of innocent purchasers relying upon judgments regular and valid on their face. But that question is not in this case. The plaintiff was claiming the right to redeem, not under the judgment, but under his equitable mortgage or lien on the land, by virtue of the assignment to him of the *Aufderheide* contract to convey. The only relation, if any, which the judgment had to the matter, was as proof that this assignment was in fact a mortgage.

Hence the only question left is whether, in view of the fact that this assignment was absolute in form, although a mortgage in fact, plaintiff had a right to redeem as a creditor without first obtaining a judicial determination that he was merely a mortgagee,—a question mooted, but not decided, in *Maurin v. Carnes*, 71 Minn. 308, 74 N. W. 139. A fuller consideration of the subject has satisfied us that there is nothing in the point.

The statute relating to redemptions expressly gives the right to creditors having an equitable lien, as well as to those having a legal lien, on the premises. There is nothing in the statute requiring creditors having equitable liens to obtain any such adjudication as a prerequisite to the right to redeem, and, without elaborating on the subject, the provisions of the statute relating to the proofs to be furnished of the right to redeem clearly imply that no such adjudication was intended or contemplated. Moreover, such an adjudication would be of little or no value, unless it was one which would be binding on all persons who might be in position to question the party's right to redeem. This could never be obtained with any certainty, for new parties of this character are liable to come into being up to the very last day of the year after the date of sale; and, of course, a judgment only binds the parties to the action and their privies. Our conclusion is that the plaintiff had a right to redeem

as a creditor without any previous adjudication that his interest in the premises was that of a mortgagee. This being so, his offer to redeem was in time.

Order and judgment affirmed.

EMIL TARRAS v. CITY OF WINONA.

June 21, 1899.

Nos. 11,576—(160).

City of Winona—Negligence—Tarras v. City Followed.

On the evidence submitted at the trial of an action brought by the husband to recover for the loss of his wife's services, etc., on account of the injuries received by her in the accident considered in *Tarras v. City of Winona*, 71 Minn. 22, it is again *held*, as a question of law, that the defendant city was not negligent when failing to erect and maintain railings or other barriers along the sides of the embankment.

Action in the district court for Winona county to recover \$10,000 damages for loss of services of plaintiff's wife and expenses incurred as a result of injuries resulting from defendant's negligence. The case was tried before Snow, J., who directed a verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Henry M. Lamberton and Brown & Abbott, for appellant.

Geo. T. Simpson, City Attorney, and *O. B. Gould*, for respondent.

COLLINS, J.

Plaintiff's wife was injured while driving a horse upon a public highway in defendant city, and in her own behalf brought an action to recover damages, claiming that the city was negligent in failing to erect and maintain railings or other barriers along the sides of an embankment built upon this highway. Plaintiff also commenced an action to recover for the loss of his wife's services, and for expenses incurred by him for medical attendance, on account of the accident. On appeal to this court it was held in the first-mentioned case, as a question of law, that defendant city was not guilty of negligence, and that the wife could not recover. Tar-

ras v. City of Winona, 71 Minn. 22, 73 N. W. 505. When this action was brought on for trial, and at the close of plaintiff's testimony, the jury was instructed to return a verdict for defendant, and such a verdict was returned. Plaintiff appeals from an order denying his motion for a new trial.

When directing a verdict, the learned trial court stated that there was no substantial difference between the testimony on which was based the claim of negligence as given at the trial of the action brought by the wife and as given at the trial then pending, and, further, that in the latter there had simply been an "amplification of the showing of the amount of traffic over the road." We quite agree with the trial court. The plaintiff's counsel did produce much more testimony as to the extent of the travel upon this particular highway, and did also detail the kind of travel, and the peculiarities of the same. But all of this merely tended to establish it as a well-traveled country road leading into the city, and, as might be expected, that there was much variety in the vehicles used, and the purposes for which used, as well as in the pedestrians who, for many and diverse reasons, had occasion to travel upon it. That it was a much-traveled highway, and within the city limits, appeared in the record of the former case. This being the fact, it was to be inferred, even if it had not been shown, that all sorts of business would be represented in the traffic over it, and that all classes of people might be expected to frequent it. The circumstances and conditions presented by plaintiff's bill of exceptions show no substantial difference in the cases on the evidence, and all of the reasons given for holding, as a question of law, that the defendant city was not negligent in failing to fence the sides of the embankment are as pertinent and potent in this case as they were in the other. This disposes of the appeal.

Order affirmed.

CHARLES J. BERRYHILL v. ALEXANDER M. PEABODY and Others.

June 21, 1899.

Nos. 11,583—(182).

Failure of Creditor to Collect Debt from Principal—Release of Surety.

The general rule as to all kinds of suretyship is that the mere passive failure of a creditor to proceed to collect a debt from the principal will not release the sureties.

Same—Bond of Assignee in Insolvency—Laches.

Held, in an action on a bond executed by an assignee in an insolvency proceeding, as principal, and by defendant's testator and by another person, since deceased, as sureties, that on the facts found by this court the creditors of the insolvents were not guilty of laches when failing to take steps looking towards the removal of such assignee, who had converted trust funds to his own use, and had also become insolvent, and towards the enforcement of the liability of the sureties on the bond.

Action in the district court for Ramsey county by plaintiff, as substituted assignee of the estate of Henry M. Bristol and M. A. McArthur, insolvents, against Alexander M. Peabody and Charles E. Clarke and others, as executors of the will of Henry Hale, deceased. The object of the action was to recover \$3,394.61 for breach of a bond executed by defendant Peabody, formerly assignee of said insolvents, as principal, and by the testator of defendant executors as surety. The case was tried before Bunn, J., who found in favor of plaintiff in the amount of \$2,318.06, with interest; and from a judgment entered pursuant to the findings, defendant executors appealed. Affirmed.

Clapp & Macartney, for appellants.

The claim of the creditors of the insolvents was not presented to the probate court within 18 months after notice of the time limited for presenting claims against decedent's estate. The creditors, knowing of the conversion, were required to take steps to have the amount ascertained. *Hantzsch v. Massolt*, 61 Minn. 361, 367. The arrangement between the assignee and the bank abandoning the application to compel an accounting operated to discharge the

sureties from all liability, or at least from liability on account of the claim of the bank. Interest can, in any case, be allowed only from commencement of the action. *Hagood v. Blythe*, 37 Fed. 249; *United States v. Curtis*, 100 U. S. 119. The action is barred by laches. *Gibson v. Rees*, 50 Ill. 383; *Sugar v. Fairbank*, 49 N. H. 131; *Paschall v. Hinderer*, 28 Oh. St. 568. Laches for less than six years aided by other circumstances will bar a right. *Evans Appeal*, 81 Pa. St. 278; *Peabody v. Flint*, 6 Allen, 52. If the creditor does not observe the utmost good faith with the surety, and fails to excuse his neglect, the surety will be discharged to the extent to which he has suffered thereby. *Benton v. Boddicker*, 105 Iowa, 548; *Continental Nat. Bank v. Heilman*, 86 Fed. 514. Where laches is in issue, plaintiff is chargeable with such knowledge as he might have obtained on inquiry. *Johnston v. Standard Mining Co.*, 148 U. S. 360; *Halstead v. Grinnan*, 152 U. S. 412; *Hardt v. Heidweyer*, 152 U. S. 547. See *State v. Probate Court of Ramsey Co.*, 40 Minn. 296; *O'Mulcahey v. Gragg*, 45 Minn. 112; *Hill v. Nichols*, 47 Minn. 382; *Smith v. Glover*, 50 Minn. 58, 54 Minn. 419; *Berkey v. St. Paul Nat. Bk.*, 54 Minn. 448; *Morrison v. Arons*, 65 Minn. 321; *Siebert v. Quesnel*, 65 Minn. 107; *Brandes v. Carpenter*, 68 Minn. 388.

Charles J. Berryhill, for respondent.

COLLINS, J.

From an order overruling a general demurrer to an amended complaint in this action, defendants appealed. The order was affirmed. 72 Minn. 232, 75 N. W. 220. Issues were then framed, and the case was tried by the court without a jury. On findings of fact and conclusions of law judgment was entered in plaintiff's favor and against each of the defendants. The appeal is taken by the defendants other than Peabody.

Stated in their chronological order, the material dates and facts are as follows: The deed of assignment for the benefit of creditors, in which Peabody was named as assignee, bore date August 29, 1885. The assignee's bond, on which Hale and Austrian were sureties, was filed in the clerk's office for Ramsey county on September 9, 1885. The order of the court requiring creditors of the insolvents, Bristol & McArthur, to file their claims bore date May 25,

1886. Peabody, the assignee, made a report to the court May 16, 1888, and at that time his account was approved, and he was directed to, and did, pay a dividend of 25 per cent. to the creditors. There was then remaining in his hands over \$3,000. A judgment was subsequently obtained against him, as assignee, for a sum exceeding \$1,000, and this judgment he paid January 19, 1890. The surety Hale died, testate and solvent, December 7 of the same year. His last will and testament was duly probated in Ramsey county, but the estate had not been settled at the date of the commencement of this action. Notice to file claims against Hale's estate was given in February, 1891, and no claim on account of any liability arising upon the bond in question was ever filed. Austrian, the other surety, died March 16, 1891. His estate was solvent, and was duly probated in Ramsey county. No claim was ever filed against this estate on account of the bond, and it was closed up and distributed in March, 1892. Peabody converted the trust funds to his own use January 2, 1892. A national bank in St. Paul, having a large claim against the insolvent estate, served a notice on Peabody, in December, 1892, that it would apply for an order compelling him to render his account, as assignee, and to distribute the funds in his hands, but this proceeding was abandoned under an arrangement made between the bank and Peabody for a partial payment of its claim and the giving of security for the balance. Peabody assigned for the benefit of his creditors in December, 1893. He was then, and ever since has been, insolvent. No further steps were taken by any of the creditors of Bristol & McArthur until March, 1897, when a petition was filed, asking the removal of Peabody and the appointment of Berryhill, the present assignee. The petition was granted, and promptly, upon qualifying as assignee, Berryhill commenced this action.

1. Peabody converted the funds on January 2, 1892,—a few months prior to the expiration of the period of one year and six months mentioned in G. S. 1894, § 4509. The claim was not presented to the probate court, and for this reason defendants' counsel insist that it cannot now be enforced. But this claim did not become absolute or capable of liquidation within the one year and six months period. See *Hantzch v. Massolt*, 61 Minn. 361, 63 N. W.

1069. And this was practically conceded when the cause was here before. The point could there have been made, but was not. Even if it were now meritorious, it is too late to be considered.

2. It is contended that the sureties upon the bond were discharged from liability by the arrangement made between Peabody and the bank, of which we have spoken. There is nothing in this, as between the defendants and the plaintiff, who, as assignee, represents all of the creditors. The conduct of the bank may have been "reprehensible," as urged by counsel, but constitutes no defense in the present action. What rights may exist as between these defendants and the bank, arising out of the transaction, or what may be the equities as between the bank and other creditors, are not now a subject for consideration.

3. The principal part of the argument of counsel for defendants is devoted to the contention that plaintiff's claim is barred by laches on the part of the creditors of the insolvents, Bristol & McArthur, and, for this reason, we have stated the dates of the various transactions quite circumstantially, as the same were found by the court.

Among its conclusions of law, the court found that the creditors had not been guilty of laches in the matter of prosecuting the claim under the bond, and counsel for plaintiff insists that this must be set over among the findings of fact, and so treated; and that on the record here, the sufficiency of the evidence to sustain the findings not being questioned, it is conclusive on the question of laches. But it is immaterial whether this be considered a finding of fact or a conclusion of law. The facts, as found with respect to the various steps taken from the time of the assignment of Bristol & McArthur, down to the day the creditors applied for the removal of Peabody, in March, 1897, are not conclusive that such creditors were guilty of laches, and the paragraph in question is merely a logical conclusion from the facts found.

The cause of action did not accrue until the conversion in January, 1892, and the action was instituted in less than six years thereafter. True it is that the creditors of the insolvents could have compelled an accounting and distribution of the estate by the assignee at any time prior to the making of an assignment by him, but they were not obliged to take the initiative. The general rule

as to all kinds of suretyship is that the mere passive failure of the creditor to proceed to collect the debt from the principal will not release the sureties. Public notice was given of all of the proceedings in the matter of the Austrian estate and the Peabody assignment, and the defendants were in as good a position, in the eye of the law, to protect the estate, as were Bristol & McArthur's creditors to protect themselves. The defendants could have paid the amount of the liability on the bond, and then have filed a claim against the estate of the other surety, and also against the estate of the insolvent Peabody, quite as readily as could the creditors of Bristol & McArthur. They did nothing to protect the estate immediately interested in this litigation, and now invoke the doctrine of laches as against their own inactivity. They are not entitled, on the facts, to the aid of the doctrine. See Board of Commrs. of St. Louis Co. v. Security Bank of Duluth, 75 Minn. 174, 77 N. W. 815. It has been urged that the defendants knew nothing of the bond until this action was commenced; but that fact is of no materiality when considering the question of laches, which is always an equitable defense, determinable by the particular facts and circumstances of each case.

4. The trial court was right when ordering judgment for interest upon the amount appropriated from the time of the conversion. Judd v. Dike, 30 Minn. 380, 15 N. W. 672; St. Paul Trust Co. v. Kittson, 62 Minn. 408, 65 N. W. 74.

Judgment affirmed.

PATRICK MEEHAN and Another v. PHILIP ZEH and Another.

June 21, 1899.

Nos. 11,621—(189).

Mechanic's Lien—Real Estate in Red Lake County—Statement Filed in Polk County.

Findings of fact,—among others material to the case,—in an action brought to enforce a materialman's lien, that the real estate in question is in Red Lake county, that the lien statement was filed in the office of

the register of deeds for Polk county, and, further, that at the time of the filing of the said notice of lien the said county of Red Lake had been recently erected out of territory formerly situate in said county of Polk, and was not fully organized for the reception of instruments for record, will not support a conclusion of law that the lien claimants are entitled to a lien upon such real property.

Organization of New County—Governor's Proclamation—G. S. 1894, § 629.

Under the provisions of G. S. 1894, § 629, upon the issuance of the proclamation of the governor declaring that a proposition to create a new county out of territory to be detached from one or more counties already organized has been adopted, the new county becomes and is one of the duly-organized counties of the state; but the territory of the same, for judicial purposes and for the enforcement of criminal laws, belongs to and is a part of the territory of the old until the officers for the new county have duly qualified. The new county is not a part of the old, nor is any portion of it attached to the parent county, for any other purposes than such as are expressly specified, as above stated.

Filing of Lien Statement.

The premises in question were situated in Polk county when the material was furnished, but they were in the newly-created county of Red Lake upon the issuance of the proclamation, December 24, 1896. The newly-elected register of deeds for the county last named did not qualify in office until the evening of January 6 following. The lien statement was filed in the office of the register of deeds for Polk county on the morning of that day. The 90 days within which the lien claimant could have filed his statement did not expire until several days subsequent to January 6. *Held*, that the filing of the lien statement in Polk county was of no validity.

Action in the district court for Red Lake county to enforce a materialman's lien for \$600.31. The case was tried before Ives, J., who found in favor of plaintiffs. From an order, Watts, J., granting a motion for a new trial, plaintiffs appealed. Affirmed.

Henry W. Lee, for appellants.

Chas. E. Boughton and *R. J. Montague*, for respondents.

COLLINS, J.¹

Action to enforce a materialman's lien upon real property. On

¹ MITCHELL, J., absent, took no part.

findings of fact, the trial court ordered judgment as demanded in the complaint, and subsequently defendants' motion for a new trial was granted.

The court found that the premises in question were in the county of Red Lake; that on January 6, 1897, a lien statement or notice was filed in the office of the register of deeds for the county of Polk; and, further,

"That at the time of the filing of the said notice of lien the said county of Red Lake had been recently erected out of territory formerly situate in said county of Polk, and was not fully organized for the reception of instruments for record."

There was nothing further which explained this finding, or which tended to aid or support the conclusion of law that plaintiffs were entitled to a lien upon premises situated in Red Lake county, although no lien statement had ever been filed therein. G. S. 1894, § 6236, requires that this lien statement shall be filed in the office of the register of deeds in and for the county in which the premises charged with the lien are situated, within 90 days from the time of furnishing the last item of labor or material. Even if it were the law, as argued by plaintiffs' counsel, that, until the newly-elected register of deeds for Red Lake county had duly qualified, that county remained a part of the territory of the parent county, Polk, this finding was insufficient to warrant the conclusion of law referred to; for it was simply that the county in which the defendants' real property was situate was not fully organized on January 6, 1897, the day the statement was filed, "for the reception of instruments for record,"—a mere conclusion. The facts in respect to the qualification in office of the register of deeds should have been found, and from these facts it would have appeared whether or not the office of the register of deeds for Red Lake county was in a condition for the proper transaction of business.

But the law is not as contended for. Red Lake county was created out of territory which had theretofore been a part of the county of Polk, in the manner prescribed by G. S. 1894, § 621 et seq. The proclamation of the governor was issued on December 24, 1896, by which it was declared that the proposition to create the new county had been adopted. By section 629 the effect of this procla-

mation was to fully create the county of Red Lake, and thereupon it became one of the duly-organized counties of the state. It is expressly provided, however, in this section, that the territory of the new county

“For judicial purposes and the enforcement of the laws against crime shall be deemed to belong to and be the territory of the county from which the same was detached until the officers of such new county have been elected, appointed and qualified as herein-after provided.”

Here we find that, while the new county becomes one of the counties of the state on the issuance of the governor's proclamation, the legislature has, *ex industria*, provided that for certain specified purposes it remains a part of the parent county until it is supplied with duly elected and qualified officers. There is no provision that for any other purpose—such, for instance, as the recording of deeds and other instruments—the territory of the new county shall continue to be a part of the old pending the election and qualification of its officers. This is perhaps a case of unintentional omission by the legislature, but it is clear that the lien statement in question could not have been lawfully filed in Polk county subsequent to the day upon which the proclamation was issued. To language so plain and explicit as is that which we have quoted, the maxim, “*expressio unius*,” etc., is peculiarly applicable and pertinent. When the law-makers expressly provided that, for the purposes specially mentioned the territory of the new county was to be deemed a part of the old, every other purpose was excluded; and, until the register of deeds was elected and had qualified, there was no office in which instruments pertaining to real estate situate in Red Lake county could be recorded legally.

It is perhaps well for us to call attention to the fact that the period of 90 days within which plaintiffs could have filed their lien statement did not expire until several days after the same could have been filed with the duly-qualified register of deeds for Red Lake county. It might be, in a case where the issuance of the proclamation deprived a lien claimant of the full statutory period prescribed for filing his claim, that, under the construction now given to the language used in section 629, we should have to hold

that by it the obligation of a contract was impaired (the right to have 90 days in which to file a lien statement), and, therefore, that the provision as to the effect of the proclamation is unconstitutional. But we have no such case, and do not decide the question. The act of filing relied on was of no validity.

Counsel for appellants also contends that, in any event, his clients were entitled to a personal judgment against defendants for the amount due. Here, again, the findings of fact are insufficient. None are found which will authorize such a judgment.

Order affirmed.

MARY H. SMITH v. ALBION B. SMITH.

June 21, 1899.

Nos. 11,641—(186).

Payment of Alimony—Modification of Decree.

An application for a modification of a decree entered in proceedings under G. S. 1894, § 4814, should not be granted unless it is apparent that the changed circumstances of the parties make it necessary. If, because of such circumstances, it is unjust and inequitable that the wife should have further allowance, it is reasonable and proper for the court to absolve the husband from further payments.

Same.

Held that, on the facts shown in this case, the lower court was warranted in relieving the defendant husband from further monthly payments to the plaintiff wife.

Petition in the district court for Ramsey county by defendant in an action in which judgment of separation from bed and board had been rendered, whereby defendant had also been adjudged to pay to plaintiff \$12 per month for her support and maintenance. The petition prayed for modification of the judgment so that petitioner be released from further payments. The matter was heard before Jaggard, J., who made findings of fact and conclusions of law, and ordered that judgment be entered in modification of the former judgment as prayed, and for recovery by plaintiff of \$100 on account

of payments due her, with \$25 attorney's fees. From this order plaintiff appealed. Affirmed.

Stevens, O'Brien, Cole & Albrecht, for appellant.

John L. Townley, for respondent.

COLLINS, J.

After four years of married life, defendant, in 1879, abandoned the plaintiff. After this, and for several years prior to 1886, he furnished her with money at the rate of \$20 per month with which to fit herself for teaching. In 1888 she commenced proceedings to secure a decree of separation from bed and board, in accordance with the provisions of G. S. 1894, § 4814. A decree of this kind was entered September 29, 1888; and a provision thereof was that he should pay for her support, and until the further order of the court, the sum of \$12 each month. Under this he had paid to her, out of his earnings, and up to the day he filed his petition asking that he be relieved of further payments, about \$1,400. Since the separation she has been employed in the public schools as a teacher, earning from \$58 to \$65 per month for 10 months in each year. She has acquired a modest home, and a small property besides, which she is able to rent. She is now, according to the findings, about 44 years of age, without children, in good health, and able to support and maintain herself without further assistance. He is now nearly 62 years of age, and is, and for more than 30 years last past has been, a locomotive engineer by occupation. He is not well or strong, and, on account of his age and health, cannot long continue to occupy his present position. His entire estate does not exceed \$200 in value. The court also found that he owed plaintiff \$100 on account of the monthly payments, ordered this sum paid, with \$25 as attorney's fees, and also ordered that a decree be entered releasing and discharging him from further payments until the further order of the court. The appeal is by the plaintiff.

The law in respect to the revision or modification of decrees in proceedings of this nature is well settled. A court should be very slow, under any circumstances, to revise or alter a former decree, and the application for a modification of an allowance should not be granted unless it appears that the changed circumstances of the parties render the modification necessary. The alteration must be

made upon the change of circumstances, and these must be shown to have changed since the original decree, unless, perhaps, it be made upon facts occurring before, of which the party was excusably ignorant at the time. When circumstances transpire which render it unjust and inequitable that the wife should have further allowance, it is reasonable and proper for the court to absolve the husband from further bearing the burden which has previously been imposed. We are very decidedly of the opinion that the court below was justified in its conclusions. For more than 30 years the defendant has been engaged in a most exacting and hazardous employment. Few men are able to remain in that kind of service when 62 years of age, as we all know. He has no means, and at best cannot expect to maintain his earning capacity for any length of time, while his wife is in the prime of life and is able to command a good salary. She also has some property. It is true that he was at fault when abandoning the plaintiff in 1879, but he has not gone unpunished. For several years after the separation he voluntarily paid her a sum of money that she might equip herself as a teacher, and for more than 10 years he has obeyed the order of the court as to the monthly allowance without complaint. If, in his old age and changed circumstances, relief is to come, except in death, it is time for its appearance.

In disposing of this cause on the merits, we must not be understood as holding the order from which the appeal is taken to be appealable. Our impression is to the contrary, but the question has not been raised by counsel, and under the circumstances we have concluded not to raise it ourselves.

Order affirmed, and judgment will be entered below in accordance therewith.

EDWARD HANSON and Another v. ASLE SWENSON.

June 21, 1899.

Nos. 11,656—(178).

Guardian's Account—Laches of Wards.

Two wards failed for more than 15 years after they attained their majority to compel their guardian to render and settle his account, or turn over property alleged to be in his possession. The delay was not explained or excused. While these wards were of the respective ages of 16 and 19 years, and living with their mother as members of her family, their guardian, by oral order of the probate court, in good faith turned over to the mother all the property of the wards which he had in his hands as such guardian, supposing such act was a settlement of such guardianship matter. It did not appear what became of the fund so turned over, and nothing was done on the part of the guardian or wards as to the fund until 18 years thereafter. The wards, when they arrived at full age, and for 16 years thereafter, and presumably several years before they arrived at their majority, knew who was appointed their guardian, but did not have actual knowledge of the state of his accounts, although they might have ascertained the same by making inquiries therefor. The guardian, without admitting that there were any funds in his hands belonging to his wards, applied to the probate court for a settlement of his accounts 18 years after he turned the property over to the mother, when the wards appeared, and for the first time claimed that the guardian still had in his hands some of the property which he had so turned over to the mother. The wards were then more than 34 years old. *Held* that, irrespective of any statute of limitations, they were guilty of laches, and not entitled to enforce any claim for such fund against the guardian.

An order was made by the probate court for Houston county allowing the account of Asle Swenson, as guardian of Edward Hanson and others, minors, and the surviving wards appealed therefrom to the district court for said county. The matter was heard in the district court before Kingsley, J., who found in favor of respondent, and ordered judgment affirming the order of the probate court. From a judgment entered pursuant to the findings, appellants appealed. *Affirmed.*

Duxbury & Duxbury, for appellants.

James O'Brien, for respondent.

BUCK, J.

On January 28, 1868, Peter Hanson died intestate in the county of Houston, in this state, leaving, him surviving, a widow and four minor children. Two of these children died while minors, and their estate is not involved in this proceeding. Of the two surviving children, these appellants, one of them, Edward Hanson, was born September 16, 1861, and the other, Mary Carr, was born June 20, 1864. On December 4, 1871, the respondent, Asle Swenson, was duly appointed by the probate court of Houston county guardian of said minor children, and duly qualified, and entered upon the discharge of his duties, and at the same time he received as such guardian from the estate of Peter Hanson, deceased, the sum of \$535 as the property of said minors, the same being their portion of the proceeds of the sale of certain land which had belonged to their father, Peter Hanson.

Thereafter Asle Swenson, as such guardian, filed certain accountings in said probate court, the last accounting having been so filed about March 16, 1880, at which accounting it appeared that he, as such guardian, had in his hands the sum of \$212.19, consisting of a balance due on a promissory note originally given for \$545, and bearing 7 per cent. interest per annum, made by one Swen Asleson and one Knute Halgrimson, the latter at that time being the husband of Kari, the widow of said Peter Hanson, and stepfather of said minor children, including the appellants. Immediately after said accounting, the said Asle Swenson, as such guardian, by oral direction of the said probate court, indorsed and delivered said promissory note to said Kari, the mother of said children; the said Asle Swenson then and ever since supposing that by said act he had completely and finally discharged his duty as such guardian of said children, who, from the time of his appointment as such guardian until the time of the said indorsement and delivery of said note, and until their removal from said county of Houston as hereinafter stated, lived continuously in, and were members of, the family of their mother and stepfather aforesaid. There was no testimony as to what became of the said note or proceeds, nor whether it was ever collected.

Shortly after the delivery of said note, the entire family removed

from Houston county to the county of Stevens, in this state, and no one ever made any claim or demand against said Asle Swenson for any money, unless the objections of these appellants to the allowance of his final account, made in probate court in 1898, amount to such claim or demand; and none of the parties supposed that Asle Swenson was liable to these appellants in any sum whatever until they were so advised by a third person, shortly before July, 1898, on which last-named day Asle Swenson appeared in said probate court of Houston county, and filed his account, charging himself as having in hand in March, 1880, said \$212.19, with interest on the same until 1882, making a total of \$227.04, and credited himself with fees as guardian from 1871 to 1882 at \$10 per annum and \$25 fees of probate, and \$92.04 paid the mother of said minors as guardian by order of the probate court; thus balancing his account. It appears that the filing of this account was a voluntary act on his part, and was not done with any intention on his part of admitting that there was, or had been since 1880, any balance in his hands belonging to the appellants. The account so filed was allowed by the probate court, and it made its order therein in the following words:

"And it appearing that the said guardian has accounted for every part of the property of said minor received by him, and the accounts of said guardian having been settled and adjusted, and a summary statement of the same, as settled, allowed, and adjusted by this court, having been above and herewith recorded, on motion of said guardian, ordered that the said accounts be, and the same [are] settled and allowed as filed in and by this court."

From said order the appellants appealed to the district court upon the ground that no such payments were ever made.

The foregoing facts were found by the trial court, and it also found:

"That at the time of the removal of the appellants herein to said Stevens county, and ever since said time, they have known that the said Asle Swenson was appointed as their guardian by said probate court in 1871, but did not have actual knowledge of the state of his accounts, but might have ascertained the same by making inquiries therefor. And the court finds as matters of fact that their failure to call upon said respondent for an accounting at the time of their majority and since was without excuse, and

that by reason thereof they have been guilty of laches in that respect.

"As conclusions of law the court finds: First, that the appellants, having failed for more than fifteen years after attaining their majority, to demand said balance from said guardian, or to compel him, as their former guardian, to render and settle his accounts in probate court or otherwise, were guilty of such laches as to bar them of any and all remedy against the respondent on account of said balance due on said promissory note; second, that the order of the probate court from which this appeal was taken should be affirmed, with costs and disbursements. Let judgment be entered accordingly."

There is no settled case, no bill of exceptions, and the question raised is whether the conclusions of law are justified by the finding of facts.

The first error assigned, and the one which must necessarily be decisive of the case, relates to the court's conclusion of law that the appellants, having failed for more than 15 years after attaining their majority to demand said balance from the guardian, or to compel him, as their former guardian, to render and settle his accounts in probate court or otherwise, were guilty of such laches as to bar them of any and all remedy against the respondent on account of said balance on said promissory note.

In considering this question of laches, we must do so upon the assumption that there is not the slightest ground to charge him with any fraudulent act or intentional wrongdoing as guardian. If he erred in the performance of his duties as such guardian, it was not intentional; but under advice of the probate court, and under the evident belief that he was acting legally, and for the welfare of his wards. And we think that all parties, including mother, guardian, and the probate court, were of the opinion that the guardian was acting lawfully, and in good faith, in all matters pertaining to the property of the wards in the hands of the guardian. As a matter of fact, he did not retain in his hands any of the property which he had received as guardian, but paid the balance in his hands over to the mother of these appellants while they were living with her as members of her family, and they were then of the respective ages of 16 and 19 years, and we may properly assume that they knew who was their lawful guardian.

The law regards an infant of the age of 14 years as of sufficient age and discretion to choose his own guardian; and, when a guardian has been appointed by the court for a minor under the age of 14 years, the minor, at any time after he attains that age, may, unless such guardian is a testamentary guardian, appoint his own guardian, subject to the approval of the court. G. S. 1894, § 4538. The record shows that in 1874 this guardian had paid for the support of these wards \$231.18; in 1875 and 1876, \$181.75; in 1877, \$80; and in 1880, \$60,—total \$552. It is true that these payments also went to the support, in part, of a minor sister of the appellants; but two-thirds presumably went to support these appellants, a considerable portion thereof having been applied to support them after they became 14 years old; and it is reasonable to presume that they then well knew who was their guardian, and that he had control of their funds. In 1880 they had actual knowledge that respondent was their lawful guardian.

On the hearing in probate and trial in district court in 1898, when they were many years past their majority, they did not claim but that they had received from their mother, by way of support or money, their share paid to her by their guardian, viz. \$212.19. They did not deny, and it is conceded, that the mother received this amount from the guardian in 1880, and that it was the full balance in his hands as such guardian. It was in the power of appellants to have testified that they did not receive any of such fund, and no excuse is shown why they did not call the mother to show what became of this property, or to show by the stepfather that he had or had not paid it. If it is not paid, its collection is barred by the statute of limitations, through the negligence of the appellants, who, at least upon coming of age, could have secured possession of the note as their property, and, if not paid, could have enforced its collection, as the maker thereof is presumed to be solvent. The appellants do not explain or excuse this delay in seeking to charge the guardian with this sum of \$212.19, nor why they do not ask their mother to explain what she did with it, or account for it, as they might easily have ascertained where the property was, or what had become of it. The delay of the guardian in not finally and legally accounting is easily explained and accounted for. The

mother was the natural guardian of the minor children, as the father was dead. Her interest in the welfare of her children would be natural. They lived with, and were cared for by, her. The probate court orally ordered the guardian to deliver the note to the mother, and, though mistaken as to the law, he in good faith delivered it to the mother.

The appellants remain silent for many years, when they should have spoken and acted, and now seek, by the technical aid of the law, to collect from the guardian property which the mother of the wards received, and which, upon all the facts of the case, was undoubtedly regarded by all the parties as a final settlement of a family matter, and which should not be disturbed upon any grounds appearing in the record. While this delivery of the note to the mother may not strictly be regarded as a repudiation by the guardian of his trust, it was evidently the full and sincere belief on his part that his trust was fully performed and ended, and that he was no longer liable, as he did not retain any of the trust funds in his hands, and the appellants never supposed that the guardian had any funds in his hands belonging to them until a third party so advised them shortly before July 9, 1898, and they then made no demand or claim upon him for any such fund other than objecting to the allowance of his account, by which accounting he evidently sought to have the record cleared up against him, and not to have a claim of nonpayment of the note hanging over him, for he made such accounting without any intent to admit that there was, or had been since 1880, any balance in his hands belonging to his wards. If the appellants had any claim against the guardian, they have slept upon their rights until the claim has become stale, and their failure to prosecute it within a proper and reasonable period renders them guilty of laches, and bars them from all remedy against the guardian on account of any alleged balance due on said promissory note. *Brandes v. Carpenter*, 68 Minn. 388, 71 N. W. 402; *Taylor v. Whitney*, 56 Minn. 386, 57 N. W. 937; *Barnwell v. Barnwell*, 2 Hill, Eq. 178.

Judgment affirmed.

ROZANN KELLY v. CITY OF MINNEAPOLIS.

June 21, 1899.

Nos. 11,650—(198).

City of Minneapolis—Personal Injury—Notice of Claim.

The notice of injury required to be given to the mayor or city clerk, under the charter provisions (Sp. Laws 1881, c. 76, subc. 8, § 20) of the city of Minneapolis, before an action can be maintained on account of such injury, can properly be given and served upon the assistant city clerk.

Same—Laws 1897, c. 248—Service upon Assistant Clerk.

And the like notice and claim to compensation required to be given and presented to the council, under the provisions of laws 1897, c. 248, § 1, may also be given and delivered to such assistant clerk; he being one of the officers having the custody of the records and files of such council.

Same.

Notice is properly given, and the claim is properly presented, under either of these laws, by delivering to the proper official a copy or copies of the original written notice and claim to compensation; said notice and claim being duly addressed to the officials designated in such laws, and for whose information they are intended.

Action in the municipal court of Minneapolis to recover \$500 damages for personal injuries caused by a defective sidewalk negligently maintained by defendant city. At the close of plaintiff's testimony the court, Kerr, J., granted a motion to dismiss the action; and from an order denying a motion for a new trial, plaintiff appealed. Reversed.

A. R. Holman and *Geo. E. La Clair*, for appellant.

Frank Healy and *L. A. Dunn*, for respondent.

Service on an assistant clerk is not service on the city clerk. Sp. Laws 1881, c. 76, subc. 8, § 20. Service of the notice is mandatory, and a condition precedent to right to maintain action. *Bausher v. City of St. Paul*, 72 Minn. 539. The legislature having designated a particular officer, process must be delivered to him alone. *Town v. Town*, 21 Vt. 488; *Town v. King*, 41 Vt. 611;

Scorpion v. Marsano, 10 Nev. 370; *Chambers v. King*, 16 Kan. 270. Process must be delivered to the person holding the office *eo nomine*, and not to one merely discharging its duties. *City of Sacramento v. Fowle*, 21 Wall. 119; *Alexandria v. Fairfax*, 95 U. S. 774. See *Dewey v. Central*, 42 Mich. 399. Nor is the necessity for the statutory service obviated because the proper person has sought to avoid service. *Van Rensselaer v. Palmatier*, 2 How. Pr. 24; *Van Rensselaer v. Petrie*, 2 How. Pr. 94; *Rees v. City of Watertown*, 19 Wall. 107. See *City v. Robinson*, 69 Wis. 230; *Amy v. Watertown*, 130 U. S. 301.

Service on the city clerk is not service on the council. *Laws 1897*, c. 248; *Sp. Laws 1881*, c. 76, subc. 1, subc. 4, § 1. If *Laws 1897*, c. 248, is construed as repealing the charter, service on the city clerk or his assistant is void for any purpose. The general law does not repeal the charter provision. It was held in *Bausher v. City of St. Paul*, *supra*, and *Doyle v. City of Duluth*, 74 Minn. 157, that the general law applies in all cities; but it does not follow that the charter provision is repealed. It is not repealed in express terms. *Moore v. City of Minneapolis*, 43 Minn. 418; *Merz v. City*, 11 N. Y. S. 778, affirmed in 128 N. Y. 617. Under similar provisions it has been held that service must be on all officials and bodies named. *Sowter v. Town*, 65 N. H. 207; *Wentworth v. Town*, 60 Wis. 281; *Benware v. Town*, 53 Wis. 527; *Goldsworthy v. Town*, 75 Wis. 24.

COLLINS, J.¹

It is assumed by both parties to this action that it was necessary for plaintiff to comply with the requirements of the city charter (*Sp. Laws 1881*, c. 76, subc. 8, § 20) as to service of notice of the injury upon the mayor of the city or the city clerk, and also to comply with the provisions of *Laws 1897*, c. 248, § 1, as to giving a like notice and the presentation of her claim to compensation to the city council, or governing body, in writing. Acting upon the assumption, the questions for determination are two in number.

At the trial, counsel for plaintiff produced a written notice, addressed to the city, to the city council, to the mayor, and to the

¹ MITCHELL, J., absent, did not sit.

city clerk, of the injury complained of, and also plaintiff's claim to compensation, which notice and claim were signed by plaintiff's counsel in her behalf, and which were concededly in due form, and then offered to show that on October 17, 1898, within the 30 days, there was delivered to the assistant city clerk, at the office of the clerk, during his absence from the city, a copy thereof for the clerk himself, and also that at the same time there was delivered to the assistant clerk, and for the city council, another copy of this notice and claim, with a request that the same be presented to the council at their first meeting; that the council was not then in session; that the first session thereafter was on October 28, 1898, which was more than 30 days after the injuries were received; and that at such session the copy so delivered for the council was presented and read by the city clerk as part of the proceedings. The trial court held the offer to be insufficient to show compliance with either of the laws before mentioned, and dismissed the action.

1. The first question grows out of the fact that the copies were served upon the assistant city clerk, instead of the clerk himself. The position of defendant's counsel is that, in order to comply with the charter provision, service must be made upon one of the two officers therein named (that is, on the mayor or the clerk), and that service cannot lawfully be made upon a deputy or an assistant of the latter, and decisions in support of this position are cited.

One of these (*Town v. King*, 41 Vt. 611) is nearly in point; and it was there held that an assistant town clerk was not a proper person upon whom to make service of a writ against a town under a statute which provided that such service should be made by leaving a copy with the town clerk, or, if he be absent from the state, by leaving the copy with one of the principal officers of the town. The reasons given for this conclusion seem to be that under the statute of that commonwealth the assistant is not an officer of the town,—is not appointed by the town, or responsible to it; he is appointed by the clerk, and the latter is responsible to the town for his acts; and, further, that in the absence of the clerk from the state the law expressly provided for service of the writ upon another town officer. Why, then, asks the court, should service be made upon the assistant, when the clerk is within the state and accessible? What we

should hold under such a statute, and with that view of the status and position of an assistant clerk, we are not required to determine.

The office of assistant clerk of the city of Minneapolis is provided for in the charter (subchapter 3, § 4). He is expressly given all the powers, duties and responsibilities of his principal, except that, by implication at least, he cannot, except in the absence or disability of the city clerk, certify to or affix the corporate seal to the copies of the files and transcripts of records. His appointment by the clerk must be confirmed by the council. The council also determines his salary, directly or indirectly. Undoubtedly, he may be required to give a bond for the faithful discharge of his duties, and is responsible to the municipality for their proper performance. Although styled officially "assistant clerk," he is in fact a deputy, and there is no reason whatsoever for holding that service of the notice and claim upon him is not within the charter provision. If we should hold that a statute which required a notice to be served upon an officer, naming him, must be construed as requiring such service to be made upon him solely, and that service upon his deputy is invalid and ineffectual, the profession would, we think, not only be surprised, but very much inconvenienced, and, in these days of much litigation, would frequently be deprived of all opportunity for serving notices and other legal papers. The charter provision was complied with when the notice was left at the clerk's office, in the hands of his assistant.

The claim that the statute of 1897, which, as before stated, provides that notice of the injury shall be given and the claim presented to the council or other governing body of the municipality within 30 days, was not complied with, because the notice was left with the clerk, instead of with the council or other body, was disposed of in *Roberts v. Village of St. James*, 76 Minn. 456, 79 N. W. 519. It was there held that, where the governing body is not in session at the time of service, the statute is complied with if the notice be directed to the council or other governing body, and is then delivered to the officer having care and custody of the records and files of such body, within the time fixed by statute. The notice involved herein was so directed, and the officers who had in custody

the records and files of the council were the city clerk and his assistant. The service was sufficient, under the statute.

2. Copies of the original notice and claim were delivered to the assistant clerk. The charter and the statutory provisions are silent as to the manner in which notice is to be given and the claim to compensation presented, except that they must be in writing. The object of requiring notice of the injury to be given and the claim to be presented is to advise the proper authorities, so that an investigation of the circumstances may be promptly made. As said in the Roberts case, notice must be given of the injury and of the claim in some practical and effectual way, in the absence of specific directions. If the required object be accomplished, the manner in which it is brought about can be of very little importance. Service by a delivery of copies of the original notice and claim to compensation is a practical way, and certainly is as effectual as would be service by delivery of the originals. The proper officers are advised of the claim, and are put upon inquiry into the surrounding facts, and nothing more can be desired. We are of the opinion that in this respect the service was adequate and complete.

Order reversed, and a new trial granted.

MARY E. BAXTER v. COVENANT MUTUAL LIFE ASSOCIATION.

June 21, 1899.

Nos. 11,665—(151).

Life Insurance—Verdict not Sustained by Evidence—Discretion of Court.

Held, that the great preponderance of evidence is so manifestly and palpably against the verdict in this case that the trial court abused its discretion in not granting a new trial.

Action in the district court for Hennepin county to recover \$2,500 on a policy of life insurance. The case was tried before Elliott, J., and a jury, which rendered a verdict in favor of plaintiff for the amount demanded. From an order denying a motion for a new trial, defendant appealed. Reversed.

L. W. Gammons, for appellant.

F. H. Ayers, for respondent.

BUCK, J.

The defendant is a life insurance company, incorporated and organized under the laws of the state of Illinois, and had authority to transact life insurance business in the state of Minnesota. On July 31, 1883, it duly issued and delivered to one John A. Baxter its policy of insurance in writing, and thereby insured the life of said John A. Baxter in favor of his wife, Mary E. Baxter, this plaintiff, in the sum of \$2,500, and soon thereafter said John A. Baxter delivered said policy to plaintiff, who then became, and ever since has been, the owner and holder of said policy.

It is alleged in the complaint that somewhere between February 25, 1897, and March 12, 1898, said John A. Baxter died in the county of Wilkin, in this state, but that this plaintiff first became apprised and acquired knowledge of the death of said John A. Baxter about March 12, 1898. It is also alleged that said John A. Baxter performed and did everything necessary to keep said insurance policy in full force up to the time of his death, and that defendant was duly apprised of his death, and all necessary steps were taken by the plaintiff to entitle her to the said insurance money of \$2,500, which she demanded of defendant, and it refused to pay the same. The death of John A. Baxter was put in issue by the answer of the defendant, and that was the principal issue litigated on the trial before a jury, and it found a verdict in favor of plaintiff in the sum of \$2,500. At the close of the testimony, the defendant moved the court to direct the jury to return a verdict in favor of the defendant upon the ground of the insufficiency of the evidence to warrant a verdict, which motion was denied, and defendant excepted. A motion to set aside the verdict and for a new trial was made by the defendant, and denied by the court, and defendant appeals.

There are no questions of law of sufficient merit to need discussion, and all issues of fact were eliminated by an agreement of counsel, save one, viz. was the body of a certain person found dead that of the insured, John A. Baxter?

It appears that for several years prior to February 25, 1897, while

John A. Baxter held this policy of insurance, he lived in the city of Minneapolis, with his wife, the plaintiff herein, and their child. For a long time prior to the last-named date he had been out of work, and was financially embarrassed and despondent, and made arrangements to leave his home, in Minneapolis, stating that he was going to Black Hills, South Dakota, to look for work. He had no money, and his wife borrowed \$57 for him. He also arranged to go as far south as Burlington, Iowa, having in charge during said trip some cars of potatoes belonging to a Mr. Healey, of Minneapolis. His duties were to attend the fires, and keep the potatoes from freezing, and for this he received free transportation. On February 25, 1897, Baxter went to St. Paul to take charge of these potatoes, but when he arrived there he telegraphed Mr. Healey that they had not arrived. Just when he went from St. Paul does not clearly appear, although it does appear that some one kept the fires in the cars, as the potatoes went through all right.

He did not communicate with his family after that date, and on February 11, 1898, Mrs. Baxter, plaintiff herein, filed sworn proof of his death with the defendant company, wherein she stated that Baxter was dead, that he died of Bright's disease, and gave the names of two physicians, who resided in Minneapolis, whom he had consulted, and who prescribed for him in his last illness.

In March, 1898, the badly-decomposed remains of a man were found near Breckenridge, in this state. A coroner's inquest was held over the body so found, and notice of the finding thereof came to plaintiff's knowledge through newspapers published in Minneapolis. An extract from the newspaper, which was pasted upon a letter written by Mrs. Baxter to the coroner at Breckenridge on March 13, 1898, states that

"The badly-decomposed body of a man was found in the woods north of town [Breckenridge] this afternoon, the discovery being made by a trapper. The coroner estimates that the body has lain there for a year or more, and identification is almost impossible. No money was found on the body, but there was a pipe marked 'M. B.,' and a small note book, which was water soaked and frozen; it is being thawed out, and may throw some light on the man's identity."

In the letter Mrs. Baxter states that her husband started for

Deadwood about one year before, and could not be found, although every effort was being made by her and friends to find him; that he was out of health; that he had an insurance, which would be of no use unless she could prove death. On March 14, 1898, the coroner answered the letter, and requested a description of her husband's clothes, size and kind of shoes, knife, comb, hat, vest, pants, teeth, size of head, and his height. She answered, saying that her husband wore a Stetson hat; dark suit of clothes; that he was six feet two inches tall in his stocking feet; long, slim hand; some of his teeth gone; gold ring on his finger; laced shoes, but nearly gone; black sateen shirt and dark tie. The plaintiff's attorney also immediately answered the letter, and stated that Mrs. Baxter had just called, and stated, among other things, that most of Mr. Baxter's teeth were gone, and especially the front ones; that he carried a short, black pocket comb; and that he carried a large wood pipe, with M. B. carved on it.

About March 19, 1898, she went to Breckenridge, where she saw the articles that were found on the body. Upon her return to Minneapolis, and on April 4, 1898, she made a second proof of death, in which she stated, under oath, that her husband died about April 15, 1897, at Breckenridge, Minnesota, and that she did not know the cause of his death, and she claimed that the body found at Breckenridge was that of her husband, John A. Baxter. After investigation, the insurance company concluded that the body found was not that of John A. Baxter, and, the proof being unsatisfactory, it declined to pay the claim, and suit therefor was instituted August, 1898, and tried October 10, 1898. As the order of the trial court denying defendant's motion for a new trial must be reversed, it is proper that we should review the evidence, and state the grounds for such reversal.

Taking up the physical characteristics first, we find that the witness Cady was a fellow workman with Baxter in 1896, and testified as follows:

"Q. Did you ever notice his feet? A. Yes, sir. Q. Do you know what size of shoes he wore? A. Yes, sir. Q. What size did he wear? A. Elevens. Q. Will you state how you know in regard to that? A. Why, Baxter and I needed shoes about the same time,

so we went up to a store, there in Harris, and Mr. Baxter got an eleven shoe, and I sent to town for mine; they didn't have just what I wanted. Q. Were you with him when he bought the shoes? A. I was with him when he bought the shoes. Q. What size shoe do you wear? A. Eight and a half. Q. Well, at that time did you notice and compare Mr. Baxter's foot with yours as to size? A. Yes; I laughed about it at the time, and made some remark about big feet."

The witness Sewall testified that Baxter wore a shoe larger than his own, which was No. 9; that he had compared the shoes, and he thought Baxter's shoes were between 10 and 12. The witness Blandin testified that he wore a No. 10 shoe, and that Baxter's was about a size or so smaller. A witness for plaintiff testified that Baxter had big feet. Mrs. Baxter did not know the size of his feet nor size of shoes he wore, but testified that they were small for a man of his size and height. Another of plaintiff's witnesses thought his feet were not as large as No. 10. These were all the witnesses who testified as to the size of Baxter's feet. Now, upon the feet of the dead body were found shoes not larger than No. 7, and one witness testified that they were about No. 6. In order to determine definitely the size of the foot of the body found, it was exhumed, and a shoe taken from its foot, which was made an exhibit in the case, and returned to this court, and conceded by each party to be the identical shoe found on the foot of the deceased. It was proven that this shoe was in size No. 6½.

As to Baxter's teeth: The plaintiff wrote to the coroner that some of his teeth were out. Her attorney wrote the coroner that most of Baxter's front teeth were out. She told the coroner that the front teeth were out. She says she told her attorney that some of the teeth were out. She testified on the stand that one or two of Baxter's front teeth were out. Another witness thought one or two teeth were out of the upper jaw, and two others testify that they thought he had one tooth out. This testimony was not contradicted. The coroner, Dr. Truax, testifies that the body found had all the teeth in their natural condition; that he picked them up, and put them back into the holes in the jaws; that the teeth were all there; that there was not a solitary one gone; and that the jaws

showed that all the teeth were there at the time of death. Dr. Hendricks testified that all the teeth had fallen out after death.

As to Baxter's height: In his application for insurance, July 11, 1883, he stated that his height was 6 feet 2 inches. Mrs. Baxter testified he was 6 feet 1½ or 2 inches tall. He weighed about 187 or 190 pounds. The body, when found, did not measure in length exceeding 5 feet 8 or 9 inches, although one witness measured the body with a spade, and, after measuring the spade, estimated the body at 5 feet 10 inches in length, and expert evidence showed that, in no event, would the body, under the circumstances, differ more than 2 inches from the life measure. As to Baxter's age: He was born in 1850, and was 48 years old when the body was found. Two expert physicians testified that the body found was not that of a person above 40 years old, and one of them stated that he was not past 35 years of age. There was considerable other evidence which tends to show that the body found was not that of Baxter. He belonged to the Knights of Pythias and Odd Fellows, and when he left home wore a K. P. button on his coat, a three-link pin on the inside of his vest, and a ring on his left hand. None of these things were found on the dead body. Other evidence also appears in the record tending somewhat to support the theory that the body found was not that of Baxter, but we do not deem it necessary to recite it in detail.

As tending to show that the body found was that of Baxter, the 13-year-old son of Baxter testified that when he went away his father wore a black suit of clothes and a black sateen shirt, a black felt hat, the same kind of shoe as was found on the dead body, and that the comb found on the dead body was the same as that usually carried by his father, and that three or four months before his father went he gave him a little blank book, which he carried in his vest pocket, and that the book found on the body was just like the one he gave his father. He also further testified as follows:

"Q. I show you this pocketknife which has been introduced in evidence, and ask you whether or not that was your father's pocketknife. A. He had one just exactly like it. Q. Is there anything about that—just look at it carefully—from which you can tell to a certainty that it was your father's pocketknife? A. From the gen-

eral shape, and from the back of the large blade being hollowed out a little. Q. Was the back of the big blade in your father's knife hollowed out like that? A. Yes, sir. Q. How long had he had that knife? A. I don't know; he had had it quite a while. Q. I will show you this pipe, and ask you if you know whether or not that was your father's pipe. A. Yes, sir. Q. How do you know that was your father's pipe,—by what means? A. By the initials on the side. Q. Whose initials are those? A. My mother's. Q. Who cut them on there? A. My father. Q. When and where? A. I don't remember just when it was, but it was in the basement of 99 South Twelfth street. Q. Is that where you lived when he went away? A. Yes, sir; it was in the winter before the spring when he went away. Q. Now, do you remember that particularly? A. Yes, sir. Q. Do you remember any conversation that was had, or any remark that was made, at the time that he carved those in there? A. No, sir. Q. About the room on there,—anything said about room for the letters? A. Why, he said, when he started in—The first letter he cut was 'M,' and he made it so wide that he couldn't get the 'E' in there, and he says, 'I can only put in the M. B.' Q. What is your mother's middle initial? A. 'E.' Q. Do you remember his making that statement at the time he cut those letters in there? A. Yes, sir."

The shirt found on the dead body was black sateen, and the suit of clothes black, and the hat felt. Mrs. Baxter, the plaintiff, testified that her husband had small feet for a large man; that when he went away he wore a blue black suit, with a fine twill; that the shoe produced looked exactly like the one he wore when he went away; that the knife looked like the one found on the body, and that she was sure that the pipe found was the one he had when he went away; that the comb he had looked like the one found; that he wore a black sateen shirt on account of his being an engineer; that the sample of cloth taken from the suit of clothes on the dead man's body was the same kind of material as her husband's clothes; and that he had a revolver when he went away. No revolver was found on the body.

The evidence here stated presents the most salient points of the case, and much of it is seemingly more conflicting than really so in fact. It may be true that the clothes worn by Baxter were of the same kind of material as those found on the dead body, and yet not in fact the same suit. The same may be said of the hat, the sateen shirt, and the blank book. The dead man may also have had a

comb and knife similar to those of Baxter's. An explanation as to the pipe may be more difficult; but, even if originally that of Baxter's, it may, in some manner unaccounted for, have come into the hands of the dead man, or plaintiff's evidence and that of her son may not be truthful. But if the shoe worn by Baxter was No. 10 or 11, and that found on the foot of the dead man was No. 6½ or 7, and Baxter's height was 6 feet 2 inches, and the dead man's only 5 feet 8 inches, or not to exceed 5 feet 10 inches, then it is unreasonable and inherently impossible to hold that the body found was that of Baxter. Upon this point the evidence is well-nigh, if not absolutely, conclusive against the plaintiff. Other evidence tended to support the defendant's theory, such as the age and teeth of Baxter.

The burden of proving the identity of the body found as that of Baxter rested upon the plaintiff. Prior to the time of making the affidavit of death upon which this suit was instituted, plaintiff made another affidavit, under oath, that Baxter had died of Bright's disease, and stated that he had it badly. The affidavit was made February 11, 1898, nearly a year after Baxter's disappearance, and before the dead body was found. The body was not found in the region to which Baxter started to go, nor in that direction, and it does not appear that he ever intended to go to Breckenridge, where the body was found.

A careful examination of all the evidence leads us to the conclusion that the preponderance of the evidence is so manifestly and palpably against the verdict that the trial court abused its discretion in not granting a new trial.

Order reversed, and a new trial granted.

HASTINGS GEHR v. AUBREY M. KNIGHT.

June 21, 1899.

Nos. 11,677—(181).

Action to Determine Adverse Claims—Findings of Fact—Conclusions of Law.

In an action to determine adverse claims to vacant and unoccupied real estate, the court found as facts that defendant was and is the owner in fee simple of the premises, and that plaintiff was not such owner. It then stated in the findings that plaintiff claimed the lands by virtue of certain tax-assignment certificates issued to him by the county auditor, and for which he had paid certain stated sums of money into the county treasury, and, in substance, that these assignments were in proper form, and conveyed to plaintiff all of the right, title, and interest of the state acquired at a certain tax sale. It was also found that notices of the expiration of the redemption period had been duly issued, and served by publication, of which proof had been duly filed more than 60 days before the commencement of this action. There was no finding that redemption had not been made. Treating the statements concerning plaintiff's claims as proper findings of fact, and not as mere evidentiary matters, it is *held*, that they do not affect or contradict the finding of the ultimate fact that defendant was and is the owner of the premises in fee simple.

Action in the district court for Renville county to determine adverse claims to land. The case was tried before Qvale, J., who found in favor of defendant; and from a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

Charles J. Berryhill, for appellant.

M. O. Little, for respondent.

COLLINS, J.

This is an appeal from a judgment in defendant's favor in an action brought to determine an adverse claim to vacant and unoccupied tracts of land. The record presented consists of the pleadings, the findings of fact, with conclusions of law, and the judgment. The claim made in behalf of the plaintiff is that on the facts, as found, judgment should have been ordered for him, instead of for his adversary.

The findings are that, before the commencement of the action,

defendant "became and is the owner in fee simple" of the land in dispute, and that plaintiff is not the owner of the same. Then follow findings to the effect that plaintiff claimed the premises by virtue of certain tax-certificate assignments issued to him by the auditor of the county of Renville, in which county the land is situated, of date July 30, 1895, and for which he paid into the county treasury a stated sum of money for each tract. The findings then set forth certain matters in reference to these certificates, which conclusively establish that they were issued in a regular way by the auditor, and which justify what is finally found,—that there was assigned by the state to plaintiff all of the right, title, and interest which had previously been acquired, under the provisions of G. S. 1894, § 1592, at a tax sale held in 1893, and that the certificates complied in all respects with the form prescribed in section 1601. There was also a finding that notices of the expiration of the period of redemption had been duly issued, and served by publication, as by law provided, and that proof thereof had been duly filed more than 60 days prior to the commencement of the action. Although the plaintiff had alleged in his reply, wherein he had set forth his claim of title quite in detail, that there had been no redemption of any of these tracts of land from the tax sale in question, there was no finding whatsoever upon this point. There were other findings in reference to certain alleged irregularities in respect to the tax proceedings, but, as we look upon the record, no further reference thereto is important.

Therefore the court found, as an ultimate fact, that when this action was commenced, and thereafter down to the making of the findings, the defendant was the fee owner of the real property in controversy, and, further, that the plaintiff was not the owner. It then went on to find or state that the latter claimed the premises by virtue of the state assignment certificates which had been issued to him, and for which he had paid certain named amounts into the county treasury, and that notices of the expiration of the period of redemption from the tax sales had been duly issued, and served by publication, more than 60 days before the commencement of this action, of which proof had been made and filed. Section 1654. Here the findings or statements ended, in so far as they related to

the claim asserted by plaintiff under the certificates, or the steps subsequently taken thereon.

Treating the statements in respect to the certificates and notices to redeem as something more than mere evidentiary matters, and as proper findings of fact (see *Butler v. Bohn*, 31 Minn. 325, 17 N. W. 862), and putting aside a suggestion that a finding as to what plaintiff claimed by virtue of the certificates is not equivalent to a finding that there was any foundation for his claim, or that he actually held such certificates, they fall short of affecting, controlling, or overcoming the ultimate facts found,—that defendant was and is the owner in fee, and that plaintiff is not such owner. The findings were not, even contradictory in any degree, for it may have been true that plaintiff procured the certificates, caused the notices as to redemption to be issued and served, and proof of such service to be made and filed, more than 60 days before this action was instituted, and also true that defendant was and remained the fee owner of the premises. There might be a number of reasons why the defendant's title was undisturbed and unaffected by the various matters and things set out in the findings. There may have been no valid judgments on which to base sales to the state, or which would authorize assignments by the auditor in behalf of the state, or there may have been redemptions; for there is no finding, as before stated, that no redemptions were made.

It is not to be inferred from the statement that proof of service of the notices had been filed more than 60 days before the commencement of this action that no redemptions had been made. The certificates are simply made *prima facie* evidence that all the requirements of law with respect to the sale have been duly complied with, and also of title in the grantee therein named to the described property, after the time for redemption has expired. Sections 1594, 1601. This *prima facie* evidence or proof of title may be met at the trial, rebutted, and completely overthrown. On these findings, we must presume that this is what occurred. In *Bell v. Dangerfield*, 26 Minn. 307, 3 N. W. 698, it was held that when title to land in a party pleading is essential, and he alleges that he has title, and then proceeds to show how he acquired it, he must state all the facts necessary to vest the title in him. Applying this rule to find-

ings, we note that there was—First, a finding that plaintiff had no title; and, second, findings or statement of facts which were insufficient to show that he had. The effort to show how he obtained title was ineffectual.

The trial court, in its conclusions of law, directed, as a condition precedent to the entry of judgment in his favor, that defendant pay into court for the use and benefit of the plaintiff the amount paid by him for the certificates, with interest, less the costs and disbursements herein; and plaintiff's counsel urges that it was error not to include in the amount the fees of the sheriff and printer, incurred in and about the serving and publication of the notices to redeem. We are not advised upon what ground the trial court placed the conclusion of law, for there was nothing in the findings which warranted it. But no complaint is made by defendant's counsel, and so it must stand. The contention is, however, on the part of plaintiff, that the court should have included in the conclusion, and under the provisions of section 1610, the payment of the sheriff's and printer's fees incurred in the service of the notices to redeem. It is immaterial whether the provisions of the section are applicable in actions to determine adverse claims or not. There was nothing in the findings as to a tax judgment, and nothing to indicate that one was to be vacated, set aside, or affected in any way. As there was no finding which warranted a conclusion that defendant should pay any sum into court as a condition precedent to the entry of judgment in his favor, there is no merit in the contention of counsel.

Judgment affirmed.

AMERICAN SURETY COMPANY OF NEW YORK v. BOARD OF COUNTY
COMMISSIONERS OF WASECA COUNTY and Others.

June 21, 1899.

Nos. 11,696—(171).

**Municipal Corporation—Contractor's Bond—Withholding Payments
from Contractor.**

A municipality which has entered into a contract for the performance of public work, and has required of the contractor the execution and delivery of a bond in accordance with the provisions of Laws 1895, c. 354, § 1, in which bond is a condition that the contractor will pay all just claims for work and labor performed and for materials furnished as they become due, has no right to withhold payments to the contractor, as such payments have been stipulated for and agreed upon in the contract, upon the ground that he is in default with his laborers and materialmen.

Same—Notice from Contractor's Surety.

Having no such right, the municipality is not disregarding its duty to a surety upon the bond when making payment in accordance with the terms of its contract, although previously notified of the default by such surety.

Action in the district court for Waseca county against defendant board, John D. Carroll, and all persons claiming under a bond executed by defendant Carroll, as principal, and by plaintiff, as surety, to secure performance by Carroll of a contract. The complaint asked to have plaintiff's liability ascertained, so that it could pay the same, and sought among other things to recover from defendant board the amount which plaintiff had been damaged by its failure to hold for plaintiff's protection certain estimates payable under the contract. The case was tried before Buckham, J., who at the close of plaintiff's case granted the motion of defendant board to dismiss the action. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Childs, Edgerton & Wickwire, for appellant.

It was the duty of the contractor to pay as they became due all claims for labor and materials furnished under the contract. Laws 1895, c. 354, §§ 1, 4. The contract is to be construed in connection

with the statute and the bond. *O'Neil v. St. Olaf's School*, 26 Minn. 329; *Sepp v. McCann*, 47 Minn. 364; *Combs v. Jackson*, 69 Minn. 336. Such payment was a condition precedent to the contractor's right to demand payment of the estimates; at least when he was confessedly in default, and interested parties insisted that he be compelled to carry out his obligations. *Langdell, Sum. Contr. § 122*; *Grant v. Johnson*, 5 N. Y. 247, 249; *Bean v. Atwater*, 4 Conn. 3; *Erickson v. Brandt*, 53 Minn. 10; *Holmes v. Richet*, 56 Cal. 307; *Fogg v. Suburban*, 90 Hun, 274; *Houston v. Nord*, 39 Minn. 490.

The board, having made the contract with Carroll, and being the only obligee specifically named in the bond, had the right, when notice of his dereliction had been brought home to it, and the laborers and materialmen and the surety were demanding protection, to insist on performance by Carroll of his agreement to pay the claims as they became due; and hence it was its duty to withhold payment of the estimates, or to see that they were applied to pay such claims. The relation of the county to the laborers and materialmen was that of quasi trustee. *Stephenson v. Monmouth Min. & Mfg. Co.*, 84 Fed. 114; *Board v. Woods*, 77 Mo. 197; *Laws 1895, c. 354*. The statute must receive a reasonable construction so as if possible to effect the purposes for which it was enacted. *Combs v. Jackson, supra*. Prior to the act laborers and materialmen had no protection. No lien could attach to public property. *Jordan v. Board of Education of Taylor's Falls*, 39 Minn. 298; *Burlington Mfg. Co. v. Board of Courthouse & C. H. Commrs.*, 67 Minn. 327. See *Village of West Duluth v. Norton*, 57 Minn. 72. It was not only the right, but the duty, of the county to withhold the estimates. *Ihk v. Duluth City*, 58 Minn. 182. A municipal corporation, or quasi municipal corporation, must perform its contractual obligations. 1 *Dillon, Mun. Corp. §§ 69, 70*; *State v. McCardy*, 62 Minn. 509. A bond taken by a public corporation, in the absence of express statutory authority, for protection of laborers and materialmen who contribute to a public contract is valid, on the ground that public corporations are under a moral duty to protect laborers and materialmen. *Breen v. Kelly*, 45 Minn. 352; *Park Bros. & Co. v. Sykes*, 67 Minn. 153; *Knapp v. Swaney*, 56 Mich. 345; *Baker v. Bryan*, 64 Iowa, 561; *Sample v. Hale*, 34 Neb. 220; *Fitzgerald v.*

McClay, 47 Neb. 816; *Marsh v. Fulton County*, 10 Wall. 676; *Board v. Woods*, supra; *Hamilton v. Gambell*, 31 Or. 328; *Perkins v. Butler*, 44 Neb. 110. The surety was entitled to all the rights, remedies and securities of the obligees in the bond (the laborers, and materialmen and the county), and had a right to insist that all lawful means possessed by them of securing performance of the contract should be exercised to protect it from loss. *Taylor v. Jeter*, 23 Mo. 244; *Warre v. Calvert*, 7 Ad. & E. 143; *Ryan v. Morton*, 65 Tex. 258; *Leavel v. Porter*, 52 Mo. App. 632; *Backus v. Archer*, 109 Mich. 666; 2 Brandt, Sur. § 307; *United States v. Hitchcock*, 164 U. S. 227. On paying the labor and material claims, the surety was entitled to be subrogated to all the funds which should have been in the county's hands. *Hodgson v. Shaw*, 3 M. & K. 183; *Cottrell's Appeal*, 23 Pa. St. 294; *McCormick v. Irwin*, 35 Pa. St. 111, 117; *Phares v. Barbour*, 49 Ill. 370; *Sheldon*, Subrog. § 120; *United States v. Hitchcock*, supra; *McArthur v. Martin*, 23 Minn. 74; *Nelson v. Munch*, 28 Minn. 314. The equity of the surety to be subrogated is inchoate from the execution of the bond, and becomes complete on payment of the debt. *Sheldon*, Subrog. § 102; *Loughridge v. Bowland*, 52 Miss. 546; *McArthur v. Martin*, supra. Having released what it should have held till Carroll had performed, the county is liable to plaintiff in that sum.

P. McGovern and John Moonan, for respondents.

The object of the act is twofold, to protect the municipality, and to secure persons who furnish labor and material in performance of the contract. *Doll v. Crume*, 41 Neb. 655; *Ihk v. Duluth City*, 58 Minn. 182; *Kaufmann v. Cooper*, 46 Neb. 644; *Steffes v. Lemke*, 40 Minn. 27. Defendant was not trustee for laborers and materialmen. The county had no right to withhold payment of estimates and to see that they were applied on claims for labor and material. There is nothing in the contract, the bond or the law to warrant such action. *City of Duluth v. Haney*, 43 Minn. 155; *Reed v. McGregor*, 62 Minn. 94; *Hayden v. Cook*, 34 Neb. 670; *Mayor v. Brady*, 151 N. Y. 611; *Village of West Duluth v. Norton*, 57 Minn. 72.

COLLINS, J.

Defendant Carroll entered into a contract with defendant board

in 1896 wherein he agreed to build a court house for the sum of \$34,765.96. He was to be paid in instalments, on monthly estimates, 85 per cent. of the cost of labor performed and material furnished. The balance (15 per cent. of the contract price) was to be retained until the building was completed. Carroll, as principal, and this plaintiff, as surety, then executed and delivered to the board a bond in accordance with the provisions of Laws 1895, c. 354, § 1, and conditioned as therein prescribed. It appears that Carroll failed to pay claims for work and labor performed and materials furnished as the claims matured, and in December, 1896, the board was notified of this failure by plaintiff surety. At a meeting of defendant board held in January, 1897, interested parties appeared before the members, stated the facts, and protested against the payment to Carroll of the amount due on an estimate theretofore made. The plaintiff surety, by its agent, took part in these proceedings, and, after showing that Carroll was in default in his payments for labor and material, objected to the payment of the amount due, unless it should be paid to laborers or materialmen. The board disregarded the objections, and thereafter paid an order upon the county given by Carroll to one of his general creditors for the sum of \$1,500. It paid no part of the 15 per cent. which was to be withheld. Carroll abandoned his contract, and the building was completed by another party.

The plaintiff paid and satisfied all legal claims for which it was bound on its bond, and then brought this action to recover the amount paid out by defendant board after notice of Carroll's default, and also to have ascertained the balance due the latter on his contract, and to recover that sum, also, of the board. When plaintiff rested, the trial court dismissed the action in so far as it was brought to recover the amount paid out on Carroll's order. It then proceeded to ascertain the sum due to the latter, but these matters subsequent to the dismissal are of no importance here. The appeal is from an order denying plaintiff's motion for a new trial of all the issues, except as to those matters last mentioned, which concerned an ascertainment of the sum due Carroll.

It is admitted that under the terms of the bond it was the duty of Carroll to pay all just claims for work and labor performed and

material furnished in and about the performance of his contract as they became due; and the question for determination is whether the defendant board possessed the right, or owed the duty, after notice of Carroll's default, to withhold payment of the sum due on the estimate, and to see that the money was applied in payment of the claims, thus protecting the surety from the loss which occurred by reason of the refusal on the part of the board either to withhold the money due on this estimate, or to pay it out on account of labor and material. Prior to the enactment of Laws 1895, c. 354, we had occasion to consider questions growing out of a charter provision which empowered a municipality to require a bond from a contractor of the same general import of the one now before us, and containing, as required by the charter and by the present statute, a condition that the contractor should pay for all labor done and material furnished as the claims became due, and it was there said that the bond possessed a double character: First, it secured to the municipality the completion of the work; and, second, it secured and protected all laborers and materialmen. Under that charter provision an action to enforce the rights of these men had to be brought in the name of the city, and to that extent and for that purpose it occupied the position of a trustee.

In respect to the party in whose name an action is to be commenced, chapter 354 differs from the charter provision, for in section 4 it is expressly provided that every interested party is to institute the action in his own name. The municipality is not a trustee for the purpose of enforcing a liability accruing to other parties through the delinquency of the contractor, for by express provision this right rests with the injured party. Nor is there any provision in chapter 354 which authorizes the municipality to interfere as between the latter and the contractor. The parties for whose benefit and protection the obligation is entered into are as independent of each other, under this law, as if separate bonds had been required and had been given. The board had agreed with the contractor, and it was its duty, to pay 85 per cent. of the estimates each month; and this agreement the contractor could enforce. In complying with the terms of the written contract, the county was fully protected by the bond, for the laborers and materialmen could obtain

no lien rights as against it. If liens could have been obtained against this public property, it is quite clear, notwithstanding the bond, that the board would have had the right to protect the premises by refusing to pay upon the estimates unless the laborers and materialmen were paid, and, having this right, it would seem to follow that a duty would arise towards this plaintiff as surety upon the bond. But such is not the case now under consideration, and, while it is the law that a creditor or an obligee upon a bond must deal fairly with a surety, he cannot be held to have dealt unfairly if he has simply complied with the terms of his contract, and has been powerless to do otherwise. The defendant board had no authority under the statute to enforce the contractor's duty towards the laborers and materialmen by withholding payment on the estimates, and consequently it neglected no duty it owed to plaintiff surety. The practical operation of a decision in accordance with plaintiff's contention would be to cast the burden upon the obligees in the bond, instead of upon the obligors.

Order affirmed.

ZENITH BUILDING & LOAN ASSOCIATION v. WILLIAM P.
HEIMBACH and Another.

June 22, 1899.

Nos. 11,483—(223).

Mortgage—Usury—Building Society.

Held, that the finding and conclusion herein of the trial court to the effect that the plaintiff is a mutual building and loan association, within the meaning of G. S. 1894, §§ 2218, 2794, exempting such associations from the usury laws of the state, and that the mortgage here in question is not usurious, are sustained by the evidence.

Same—Constitution.

Held, that the statutes so exempting such associations are constitutional.

Action in the district court for St. Louis county to foreclose a mortgage. The case was tried before Moer, J., who found in favor

of plaintiff; and from an order denying a motion for a new trial, defendants appealed. Affirmed.

Keyes & Baldwin, for appellants.

Plaintiff is not a building and loan association within contemplation of the laws which exempt such associations from usury. In such an association there must be mutuality. In order that there may be mutuality, the money should be raised by dues paid in on stock and moneys loaned, and the association should not be a borrowing and loan brokerage institution. See *City Loan Co. v. Cheney*, 61 Minn. 83. Borrowing money to reloan must not be made an essential element. *McCauley v. Building*, 97 Tenn. 421; *Stiles's Appeal*, 95 Pa. St. 122; *State v. Building*, 35 Oh. St. 258, 263; *North Hudson v. First*, 79 Wis. 31. See Laws 1889, c. 236, §§ 1, 22. If plaintiff ever was such an association, it has departed from its legitimate purpose and used the privileges of its charter as a mere cloak for usury. One of the fundamental ideas of these associations is that their accumulated funds should be freely loaned to members at a rate fixed by free competitive bidding. *Endlich, Bldg. Assns.* §§ 42, 375, 378, 397, 399; *McCauley v. Building*, *supra*; *State v. Greenville*, 29 Oh. St. 92, 100; *Stewart v. Hamilton* (Tenn. Ch. App.) 47 S. W. 1106; *Stiles's Appeal*, *supra*; Laws 1889, c. 236, § 30.

Many courts have held that a premium means a present sum, and that a sum in addition to interest to be paid in instalments is not a premium, but only interest under another name. *Endlich, Build. Assns.* § 393. Such a premium renders the loan usurious. *Mechanics v. Wilcox*, 24 Conn. 147, 152; *Birmingham v. Maryland*, 45 Md. 541. The fact that no one was permitted to become a stockholder except on condition of becoming a borrower shows conclusively the spirit and purpose of the organization. *People's v. Rising* (Tex. Civ. App.) 34 S. W. 147. *Central B. & L. Assn. v. Lampson*, 60 Minn. 422, is distinguishable. See *Kupfert v. Guttenberg*, 30 Pa. St. 465, 470; *Hawkins v. American*, 96 Ga. 206; *Endlich, Bldg. Assns.* § 7; *Central B. & L. Assn. v. Lampson*, *supra*; *Myers v. Alpena*, 117 Mich. 389; *Martin v. Nashville*, 42 Tenn. 418; *Hagerman v. Ohio*, 25 Oh. St. 186, 204.

If plaintiff is such an institution as was intended to be exempt from the usury laws, the act is class legislation and unconstitutional. Such laws have been held unconstitutional even when applied to strictly mutual societies doing business on the building society plan. *Henderson v. Johnson*, 88 Ky. 191. The act will be so construed as to admit of its being held constitutional, if one interpretation would make it so and another not. *Lavallee v. St. Paul, M. & M. Ry. Co.*, 40 Minn. 249. But the law cannot adopt a mere arbitrary classification. *Nichols v. Walter*, 37 Minn. 264, 271. See *Gordon v. Winchester*, 75 Ky. 110; *Cameron v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 384; *Maudlin v. American S. & L. Assn.*, 63 Minn. 511; *State v. Sheriff of Ramsey Co.*, 48 Minn. 236.

J. B. Richards, for respondent.

The law exempting building and loan associations from the usury law is constitutional. *Vermont v. Whithed*, 2 N. D. 82; *People's v. Billing*, 104 Mich. 186; *Archer v. Baltimore*, 45 W. Va. 37; *Winget v. Quincy*, 128 Ill. 67; *Mechanics v. Allen*, 28 Conn. 97; *McLaughlin v. Citizens*, 62 Ind. 264; *Holmes v. Smythe*, 100 Ill. 413, 422; *Freeman v. Ottawa*, 114 Ill. 182. Plaintiff is in fact a building and loan association. Its character is determined by its articles and by-laws. *Fitzgerald v. Hennepin Co. Catholic B. & L. Assn.*, 56 Minn. 424; *Central B. & L. Assn. v. Lampson*, 60 Minn. 422, 424; *United States v. Shain (N. D.)* 77 N. W. 1006; *Leahy v. National*, 100 Wis. 555. See *Hawkins v. American*, 96 Ga. 206; *Thompson, Bldg. Assns.* §§ 188, 191. As to the fairness and wisdom of such associations borrowing to reloan to members, see *Thompson, Bldg. Assns.* § 116; *Endlich, Bldg. Assns.* § 305; *Grommes v. Sullivan*, 26 C. C. A. 320, 81 Fed. 45, 43 L. R. A. 419 and cases in note. Defendant is equitably estopped, in the absence of statutes forbidding such by-laws, from raising the question of ultra vires to do the specific acts or to make him a loan in violation of a by-law. *United States v. Shain*, supra; *Endlich, Bldg. Assns.* §§ 122, 288, 397; *Thompson, Bldg. Assns.* §§ 103, 104, 185, 188; *Orangeville v. Young*, 9 W. N. Cas. 251; *McCauley v. Workingman's*, 97 Tenn. 421; 5 *Thompson, Corp.* §§ 6021-6029; *Reynolds v. Georgia*, 102 Ga. 126; *National*

Bank v. Matthews, 98 U. S. 621; *Central B. & L. Assn. v. Lampson*, 60 Minn. 422, 424.

S. T. Harrison, by consent, filed a brief for respondent.

START, C. J.

This is an action to foreclose a real-estate mortgage executed April 16, 1892, by the defendants to the plaintiff to secure a loan of \$4,000 made by it to the defendant William P. Heimbach. The making of the mortgage and bond secured thereby, and that the payment of interest and premium and dues was not made as the bond and mortgage required, were admitted by the defendants, but they alleged as a defense that the transaction was usurious. The trial court made its findings of fact and conclusions of law to the effect that the mortgage was a valid security, and directed judgment of foreclosure and sale of the mortgaged premises. The defendants appealed from an order denying their motion for a new trial.

The amount agreed to be paid in this case as interest and premium was in excess of interest at the rate of 10 per cent. per annum on the sum loaned, and the real question in this case is this: Is the plaintiff exempt from the usury laws of the state? The defendants claim that the question must be answered in the negative, for three reasons: First, the plaintiff was not organized as a building and loan association, within the meaning of the statute (G. S. 1894, §§ 2218, 2794) exempting such associations from the usury laws of the state; second, if it was so organized, it departed from the purposes of its organization, and used its privileges and its charter as a cover for usurious transactions; third, that the statutes in question are class legislation and unconstitutional, if they apply to such a corporation as the plaintiff.

1. The first and second claims may be considered together, for they are practically one. Tersely stated, the claim is this: The plaintiff is not a building and loan association, because it was organized to do and did do business not within the scope of such associations. It is not claimed by the defendants that the loan in question was usurious because of any specific violation of the principles of building and loan associations in this particular case, but that the plaintiff is not such an association, therefore it is not exempt

from the usury laws of the state, and that all the defendants were required to show, in order to establish their defense, was the fact that the premium and interest which they agreed to pay were in excess of the highest rate of interest allowed by law. The trial court found as a fact that the plaintiff is a mutual building and loan association duly organized under the laws of this state. This finding is challenged by the defendants.

The undisputed evidence establishes these facts: The plaintiff was incorporated under G. S. 1878, c. 34, tit. 2, to commence business June 4, 1888. The general nature of its business was declared in its articles of incorporation to be the accumulation of funds by the contributions of its members, to be loaned to such members as desired the same, and in such manner as might be prescribed by its by-laws. The directors were authorized by its charter to borrow money, in their discretion, for the purpose of loaning it to its members. The limit of its liabilities was originally fixed at \$30,000, but it was afterwards raised to \$250,000. They were also authorized, in their discretion, to issue or to withhold the stock of the association. The by-laws provided that no money should be sold at a less premium or bonus than 40 per cent., and also that,

"If any application requires immediate attention, the association may make loans between the monthly meetings: provided, such loans are approved, in writing, by the president, secretary, and treasurer, and four other directors, and the premium paid is not less than the highest paid at the last sale of money."

The business was limited to the county of St. Louis and adjoining counties, and it was annually licensed by the public examiner of the state as a mutual building and loan association. It borrowed between the years 1889 and 1895 money for the purpose of reloaning it to persons who were or were about to become stockholders. The amount so borrowed is not disclosed by the evidence. The association, at some time not disclosed by the evidence, but the trial court finds that it was in 1888, passed a resolution to restrict the issue of shares to those who wanted to borrow. On September 2, 1889, at a meeting of the association, the highest bid for money was 70 per cent. After this the money was not put up at auction, as all applications for it were made between meetings; and, after the passage

of the resolution referred to, all persons applying for stock in the association were required to make an application for a loan of money on the stock subscribed, and, as a part thereof, bid a premium of 70 per cent. therefor.

The defendant William P. Heimbach was one of the original incorporators and a director of the plaintiff association, and the holder of 100 shares of its stock before he became a borrower. He made application for a loan, and bid therefor a premium of 70 per cent., and a loan was awarded to him, pursuant to his application for the loan; and defendants executed and delivered to the plaintiff the bond and mortgage described in the complaint, securing the repayment of the loan. The defendants, upon the loan, received from the plaintiff the sum of \$4,000, at the time of making it. The defendant William P. Heimbach, also, as a condition of the loan, subscribed for 300 additional shares of stock, which, with the stock then owned by him, were assigned to the plaintiff as further security for the loan. The majority of the directors of the plaintiff were borrowers.

The defendants claim that the provision of the plaintiff's charter authorizing it to borrow money to loan to its members, its by-law fixing a minimum premium, and its resolution limiting the issue of stock to borrowers, destroy that mutuality which is the fundamental basis of the building and loan association, whereby the members loan to one another the funds accumulated by their mutual savings, and, further, that the provisions referred to, and the method of transacting its business, as disclosed by the evidence, justify the conclusion that the plaintiff is a building and loan association in name only, and a mere device and cover for usury. If this be so, the mortgage in question must be held to be void; for the law will ferret out usury with the vigilance of a heresy hunter, no matter how subtle the device or shift adopted to conceal it may be. *City Loan Co. v. Cheney*, 61 Minn. 83, 63 N. W. 250. But the evidence in this case does not justify the claim of the defendants.

The mere fact that its charter authorized its directors to borrow money to loan to its members does not tend to show that the plaintiff is not a mutual building and loan association, for the borrowing of money to loan to its members standing in need of accommodation

beyond its immediate cash resources would be serving the legitimate purposes of its organization. Endlich, Bldg. Assns. § 301. Nor does the mere fact that it passed a resolution limiting the issue of further stock to borrowers, and that the resolution was enforced, necessarily impeach the claim of the plaintiff to be a building and loan association. It might be otherwise if the limitation was in its charter, and it appeared from the evidence that the promoters or incorporators had subscribed for a large number of shares, and had then adopted and enforced the limitation, and borrowed money to loan to the new members. But, as already suggested, such is not this case. It is not difficult to conceive of contingencies where it would not only be legitimate for a building and loan association to limit the number of shares any one member should be entitled to subscribe for, but also to limit future issues of stock to those who wished to borrow. Some such action would be necessary in cases where the investors were more numerous than the borrowers, and idle funds were accumulating. There is, however, no evidence in this case which would justify the inference that the resolution in question was passed to prevent the accumulation of funds, but the evidence does not warrant the inference that it was passed to serve any fraudulent or improper purpose. We have no statute which requires building and loan associations of the class to which the plaintiff belongs to loan its funds at competitive bidding only, or forbidding them from adopting a by-law fixing a minimum premium. Such a by-law applies to all borrowers alike, and does not trench on the mutuality feature of such associations.

The finding and conclusion of the trial court to the effect that the plaintiff is a mutual building and loan association, within the meaning of the statutes exempting such associations from the usury laws of the state, and that the mortgage in question is valid, are sustained by the evidence. *Central B. & L. Assn. v. Lampson*, 60 Minn. 422, 62 N. W. 544.

2. It has been assumed by this court, in several cases, that the provisions of the statute (G. S. 1894, §§ 2218, 2794) exempting building associations from the operation of our usury laws were constitutional, but the question was not directly raised or decided. In this case the defendant urges that such statutes are class legislation,

and therefore unconstitutional. The operations of building and loan associations proper, when they adhere to the basic principles of their organization, differ so radically from ordinary loan transactions as to afford a proper basis for classification, and to justify the legislature in making a separate class of them; hence a statutory exemption of them from the operation of usury laws is constitutional. This proposition is sustained on principle and the great weight of authority, and we hold the statutes here in question constitutional. 4 Am. & Eng. Enc. 1073.

3. The remaining assignments of error, not covered by what we have already said, have been examined, and found to be without merit.

Order affirmed.

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s80 86

VANCE KING v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

June 22, 1899.

Nos. 11,632—(61).

Personal Injury—Highway Crossing—Negligence—Proximate Cause.

Action to recover for personal injuries sustained by the plaintiff in a collision with defendant's locomotive at a public highway crossing. *Held*:

1. That the verdict, to the effect that the defendant was, and the plaintiff was not, guilty of negligence in the premises, is sustained by the evidence.

2. Where an injury is caused proximately by the concurring negligence of two or more parties, each is liable for the result, and that a request for instructions to the jury which ignored this rule was rightly refused.

Action in the district court for Mower county to recover \$2,000 for personal injuries. The case was tried before Whytock, J., and a jury, which rendered a verdict in favor of plaintiff for \$1,000; and from a judgment entered pursuant to the verdict, defendant appealed. Affirmed.

H. H. Field and Shepherd & Catherwood, for appellant.

Lafayette French and A. W. Wright, for respondent.

START, C. J.¹

At about 11 o'clock of the morning of October 9, 1896, the plaintiff, while in the act of driving his team over a public-highway crossing of the defendant's railway tracks in the village of Blooming Prairie, this state, was struck and injured, his horses killed, and his wagon destroyed by the defendant's locomotive attached to a freight train. He brought this action to recover the damages so sustained. The complaint alleged that the plaintiff's injuries were caused without any negligence on his part, but solely by the negligence of the defendant in running the locomotive over the crossing at a dangerous rate of speed, without giving any signal or warning of its approach. The answer put in issue these allegations of the complaint. There was a verdict for the plaintiff for \$1,000, and a motion for a new trial by the defendant, which was denied. Judgment was entered on the verdict, from which the defendant appealed.

The assignments of error raised two general questions, (a) as to the sufficiency of the evidence to support the verdict, and (b) as to the correctness of the action of the trial court in charging the jury, and in refusing to give certain special requests for instructions.

1. The evidence is unquestionably sufficient to support the finding of the jury that the defendant was guilty of negligence in the premises. This is practically conceded by its counsel; but it is vigorously urged that the evidence conclusively established that the plaintiff was guilty of negligence, which was the cause of his injury.

The defendant's main track at the place of the accident runs north and south, with a side track on the west, about 35 feet from the main track, and parallel with it. A public street of the village, extending east and west, crosses the main and side tracks. At the time of the accident there was a flouring mill on the west side of the side track near the intersection of the street with the railway track. North of the mill, and on the same side of the track, there were coal sheds and other buildings, which obstructed the view to the north of a person traveling eastward over the street crossing; but between the tracks the view to the north was unobstructed for some 1,000 feet. There was at the time standing on the side track and on the

¹ COLLINS, J., took no part.

north side of the street a box car, which extended into the street from two to six feet.

The plaintiff was familiar with the crossing and its surroundings. His own testimony as to the accident was to the effect that, as he was driving eastward along the street towards the crossing, and when about 300 feet away, he looked both to the north and to the south for a train, and saw none. His team was ordinarily gentle, and he had never had any trouble with them. As he approached the car standing on the mill track, his team was walking. He did not hear or know of any trains approaching. He heard no signals whatever. The mill was running, and made quite a noise, the wagon also, and the wind was blowing hard from the south. He did not stop his team until he was struck by the train. As he was driving around the car, some 35 feet from the main track, his near horse shied and started up, and he attempted to hold his team, but they went quite fast, and when he got onto the track he went "into darkness," and knew nothing. On his cross-examination he testified:

"Q. After they got over the side track, at what gait were your horses going? A. The near one was ahead, I was pulling on them. Q. At what gait were they going? A. They were not going much faster than a walk, if any. Q. As I understand it, the near horse started up a little? A. Yes, sir. Q. But didn't go into a run? A. No, sir. Q. They were under full control? A. Yes, sir; any more than one was ahead of the other. Q. You had them under control all right? A. I couldn't stop them immediately. Q. You could have stopped them if you found it necessary to stop them? A. I couldn't stop them immediately right there. Q. I say they were under your control? A. It depends what you call under my control. Q. They were not running away? A. No, sir. Q. Not so but what you could readily have stopped them in a few feet? A. In a short space of time." Upon being recalled he further testified as follows: "Q. Now, last evening, Vance, you stated that as you drove up there your horses were frightened at this car that stood there. A. Yes, sir. Q. And, in reply to my question of what you were doing from that time until you went into what you termed this 'darkness,' you said you were looking after your horses. A. Yes, sir. Q. Why were you looking after your horses? A. They became frightened, and it was rough there, and it was my duty to take care of them, to keep from being thrown out of the wagon. Q. Which way did they go,—directly across or angling about? A. No, sir; the near horse shying brought them kind of down the track south

west. Q. Were you on this spring seat? A. Yes, sir. Did it require all your attention to look after your team? A. Yes, sir; I tried to hold them. Q. Did you have any time for anything else? A. No, sir; it took all my time to hold them; I didn't have them under control then."

There was evidence tending to show that the train was running from 20 to 30 miles an hour when it reached the crossing. The defendant claims that it was the absolute duty of the plaintiff to stop his team, and listen, before he attempted to drive past the car into a place of danger. The plaintiff's conduct is not to be judged by the facts as they appeared after the accident, but as they appeared to him at the time. He was familiar with the crossing, and presumably knew that when he passed the car he would have a clear view of the main track to the north, and an opportunity, before driving upon the main track, of learning absolutely whether or not a train was approaching. His team was gentle, and he had no reason to anticipate trouble from them; but, according to his testimony, when he was in the act of passing the box car an unforeseen fortuity arose,—his team became frightened, and his attention was absorbed in controlling them, and before he was conscious of the situation they were upon the track, and he was struck. The time and manner of eliciting from the plaintiff testimony as to the vital factor in his case—the unexpected fright of his team and consequent engrossment of his attention in controlling them—were matters for the jury to consider in determining the credit they would give to his evidence. We cannot say, as a matter of law, that the evidence was not sufficient to justify a finding by the jury that his team became frightened and his attention absorbed, as claimed.

Our conclusion, from a consideration of the entire evidence, is that the question of the plaintiff's contributory negligence was for the jury.

2. The trial court in its charge to the jury stated that the plaintiff claimed that, after passing the car, his horses took fright, shied, and became unmanageable, and if that was true, and he exercised ordinary care in trying to control them, and they plunged onto the crossing, and it was physically impossible to prevent them, the jury must

take "that into consideration." The exception of the defendant to this statement, and the action of the court thereon, were as follows:

"Defendant excepts to the general charge of the court wherever the court charges the jury that the plaintiff claims he lost control of his horses at the crossing." By the Court: "Counsel has called my attention to this subject. I meant to state that the plaintiff claims that at or near the crossing his horses became unmanageable, and I will correct my charge in that way."

The defendant claims that there was no evidence in the case tending to show that plaintiff lost control of his team, or that they plunged onto the crossing, and assigns the giving of the instruction as error. The exception did not call the attention of the court to the claim now made; but the court seems to have understood the point of the exception, and modified the instruction. The modification seems to have been satisfactory to the defendant at the time, as the exception was not renewed. However this may be, the instruction, as modified, was not erroneous.

The defendant requested the trial court to give the following requests:

"(2) You are instructed that the undisputed evidence shows that, after the plaintiff got across the side track, he had a clear view of the railroad to the north of more than 1,000 feet, and that he had this view when at a distance of about 35 feet from the main track."

"(5) The jury are instructed that if you shall find that there were cars standing near the mill, one of which projected into the street, and if you shall further find that these cars were so placed by the mill men, in pursuance of their private business, and that the defendant had no notice, either actual or implied, that the cars were in this position, and if you shall further find that the position of these cars was the proximate cause of this accident, then the defendant is not liable in this action, and your verdict should be for the defendant."

The court instructed the jury with reference to the subject-matter of the second request as follows:

"If you find that the view of the railroad to the north was obstructed until the plaintiff came up to or passed over the side track, then it was his duty to look after he got past the obstruction, and when he came to a place where he could have a view of the railroad to the north. You are instructed that the undisputed evidence

shows that, after plaintiff got across the side track, he had a clear view of the railroad to the north. I don't know how many feet that was, but you will remember from the evidence. I think there is no doubt, from the evidence, that there was a clear view of some 30 feet wide between the two tracks; that the side track was between 30 and 35 feet from the main track."

The defendant excepted to the comments of the court in qualifying its second request, and assigns such modification as error, for the reason that it was entitled to a positive instruction that the plaintiff had a clear view of the track to the north of more than 1,000 feet, and that the instruction, as given, created a doubt in the mind of the jury whether this clear view was more than 30 feet in extent. This assignment of error is without merit. The court unqualifiedly instructed the jury, not only that it was the duty of the plaintiff to look after he passed the side track, but that, after he passed it, his view to the north was unobstructed; and it is perfectly manifest that the court by the words "a clear view of some 30 feet wide between the two tracks" referred to the distance between the side and main tracks, and not to the extent of the view to the north. The instruction was quite as favorable to the defendant as it was entitled to.

The fifth request was refused, and rightly so. It was not an accurate statement of the law, and was misleading, as applied to the facts of this case, even if it be conceded that there was evidence tending to prove the facts assumed in the request. The presence of the car in the street seems to have been a mere incident in the history of the accident, and not one of the proximate causes of the plaintiff's injury. If this had been a case where the plaintiff's team became frightened, and ran away, whereby he was thrown out and injured without any other intervening cause, the defendant would have some basis for its claim that it was error to refuse the request. But such is not this case, for the evidence is plenary that the defendant's negligence in driving its locomotive across the track, without giving any signals, was the proximate cause of the plaintiff's injury.

If, however, it be assumed that the evidence warranted a finding that the leaving of the car in the street was a proximate cause of the injury, the evidence would not warrant a finding that it was the

sole cause thereof. Where an injury is caused proximately by the concurring negligence of two or more parties, each is liable for the result. *Johnson v. Chicago, M. & St. P. Ry. Co.*, 31 Minn. 57, 16 N. W. 488; *Johnson v. Northwestern Tel. Exch. Co.*, 48 Minn. 433, 51 N. W. 225. The request ignored this rule, and was misleading, in that, if given, the jury would be liable to understand it as eliminating from the case the evidence as to the defendant's alleged negligence, if they found that the act of the mill men in placing the car in the street was a proximate cause of the accident.

Judgment affirmed.

PETER J. BLIEN and Others v. LARS M. RAND and Others.

June 22, 1899.

Nos. 11,634—(177).

Corporation—Articles of Incorporation—Stockholders.

The right to membership in a corporation may be restricted by express provision of its charter, although it is organized under G. S. 1878, c. 34, tit. 2.

Same—Stockholders Limited to Norwegians—Insolvency—Estoppel of Other Stockholders.

The defendants subscribed and paid for stock and accepted certificates therefor in a corporation which, by its charter, restricted the right to hold stock therein to persons of a certain nationality, to which the defendants did not belong. The corporation accepted them as stockholders, and, without objection from them, they appeared as stockholders on the books of the corporation for three years, when the corporation became insolvent. In the meantime debts were contracted by the corporation, which are unpaid. *Held*, that the defendants are estopped, as against creditors, to assert that they are not stockholders because they were not in fact eligible to membership in the corporation.

Action in the district court for Hennepin county to enforce the statutory liability of stockholders in a corporation known as *Nor-manna*. The case was tried before Lancaster, J., who found in

favor of plaintiffs and against certain defendant stockholders, and in favor of other defendant stockholders. From a judgment entered pursuant to the findings, plaintiffs appealed. Modified.

John G. Hvoslef and W. S. Dwinnell, for appellants.

Cross, Hicks, Carleton & Cross, Koon, Whelan & Bennett, Wilson & Van Derlip, A. D. Smith, Wm. H. Morse, Penney & McMillan, Benj. Davenport, Merrick & Merrick and C. G. Laybourn, for respondents.

START, C. J.¹

This is an action, under G. S. 1894, c. 76, to enforce the liability of stockholders of Normanna, a corporation of this state, for its debts. The defendants, for convenience, may be classified and referred to as (A) eligible stockholders, (B) noneligible holders of certificates of stock, and (C) noneligible subscribers for corporate stock. The trial court made its findings of fact and conclusions of law, directing judgment, as prayed for in the complaint, against class A, and in favor of classes B and C, dismissing the action on the merits as to them. Judgment was so entered, and the plaintiffs appealed from the judgment in favor of classes B and C.

No question is here made as to the liability of the defendants designated as class A,—that is, the eligible stockholders. There is no settled case or bill of exceptions in the record, and the question for our decision is whether the conclusions of law of the trial court and the judgment are justified by the facts found. The trial court found all the essential facts to sustain its conclusion that the stockholders of the corporation were liable to the amount of their stock for the debts of the corporation, but it also found, in legal effect, as a conclusion from the special facts found, that the defendants composing classes B and C were not stockholders.

The special facts upon which this conclusion was based were, concisely stated, these: Normanna is, and has been since January 6, 1886, a corporation duly organized under G. S. 1878, c. 34, tit. 3. The general nature of its business was, by its articles of incorporation, declared to be:

“The buying, leasing, and owning of real estate in the city of Minneapolis, county of Hennepin, state of Minnesota, and improv-

¹ CANTY, J., took no part in the decision.

ing the same, erecting thereon such building or buildings, containing a hall or halls sufficient and convenient for the use of this association, and its members; and to lease, let, and rent to others for hire the said hall or halls, storerooms, or any and all parts of said building or buildings; provided, however, that no intoxicating liquors shall be sold on the premises; and to do any and all things necessary, expedient, and pertinent to the purposes and ends aforesaid; and to advance the interests of its members and the Norwegian residents of Minneapolis, Minnesota, and vicinity."

The capital stock of the corporation was fixed by its articles at \$50,000, and the number of shares thereof at 5,000, of \$10 each. Article 7 of its charter was this:

"No person shall be a stockholder in this corporation unless he or she be a Norwegian by nativity or lineage, or shall have been a Norwegian citizen, or speaks the Norwegian language, and is a resident of the city of Minneapolis or vicinity."

All of class A were eligible to membership under this article, but classes B and C were not; nor was the defendant John C. Oswald. The corporation, by its board of directors, February 29, 1887, adopted a resolution that shares in the corporation be sold to others than Norwegians, and thereafter solicited subscribers and sold stock to any and all classes who would buy, regardless of nationality or the language spoken by them. It does not appear that any persons to whom stock was issued ever objected to such action. Each of the defendants belonging to class B subscribed for one or more shares of the stock of the corporation, as particularly set forth in the trial court's findings of fact, and each paid the corporation in full for the shares subscribed by him, and the corporation issued to each of them a certificate of stock pursuant to and in compliance with his subscription, which he has ever since retained. Each and all of such defendants were duly notified of the semiannual meeting of the stockholders of the corporation, during the period of "their stockholding," which in each case was at least three years. Some of them, however, never attended any of the stockholders' meetings. The corporation was designated in some of the subscription contracts as "Normanna" and in others as "Normanna Hall Association," and its certificates of stock so issued were in form as follows:

"State of Minnesota. Normanna Hall Association. Capital stock, \$50,000. This certifies that ——— is entitled to ——— shares of the capital stock of the Normanna Hall Association. Transferable only, with consent of the board of directors, on the books of the association, in person or by his lawful attorney, upon the surrender of this certificate. Witness the corporate seal of said association at Minneapolis, this ——— day of ———, A. D. 18—."

This form of certificate was used, and none other, by the corporation Normanna as its certificate of stock, and each and all of the defendants of class B had notice that such certificate was the certificate used by the corporation as its stock certificate.

The defendant John C. Oswald subscribed for 25 shares of the stock of the corporation, and directed his agent to pay for it on demand. The agent did so, and the corporation issued a certificate of stock pursuant to the subscription, which was accepted by the agent and placed in Oswald's safe, where it remained until the trial of this action; but he did not in fact know that the certificate had been issued. He was, however, duly notified of all of the meetings of the stockholders of the corporation for a period of at least seven years. At the time he subscribed for stock he supposed he was making a donation to the corporation, and not subscribing for stock. All of the unpaid debts of the corporation were contracted subsequent to the issuing of the stock to class B and to the defendant Oswald.

The defendants composing class C signed a stock-subscription contract, but no certificates of stock were ever delivered or tendered to any of them until after the corporation made an assignment in insolvency for the benefit of its creditors. One of such defendants, George H. Fletcher, paid his subscription before the assignment by the corporation. The assignee of the corporation tendered to the defendant Loren Fletcher a stock certificate for the amount of his subscription, which he refused to accept on the ground that he had not, as he claimed, subscribed for any stock, but had agreed to donate the amount of his subscription to the corporation. Thereupon the assignee demanded of him the amount of his subscription, which he paid as a donation, and the assignee wrote on the subscription agreement, in connection with the signature of the defendant, these words: "Paid \$250 as a donation, but not for shares

of stock, as it was the understanding of both parties to the contract that it was a mere gift." The defendant Philip B. Winston of this class never paid anything on his subscription agreement. None of the defendants in class C was eligible to membership in the corporation, under the provisions of article 7 of its charter. There is no finding that any of the unpaid debts of the corporation were contracted subsequent to the stock subscription by class C.

The plaintiffs claim that the corporation was organized under title 2, c. 34, G. S. 1878, and the defendants here contesting their liability claim that it was organized under title 3 of the chapter. The question as to which of the two titles the corporation was organized under was earnestly and fully discussed in the respective briefs of counsel, but it is immaterial in this case under which title the organization was effected; for each stockholder in any corporation, except those organized for carrying on a manufacturing or mechanical business, is liable for the debts of the corporation to the amount of stock held or owned by him. Const. art. 10, § 3. Counsel for plaintiffs seem to assume that, if the corporation was organized under title 2, the article of its charter prescribing a test of membership would be simply surplusage. We are not referred to any statute which directly or by implication forbids corporations organized under title 2 from providing in their articles of incorporation qualifications for membership. It is not difficult to conceive of cases where such a limitation of membership might be desirable,—for example, corporations for the handling and marketing of farm products by the producers. In the absence of a statute to the contrary, the right to membership in a corporation may be restricted by express provision of its charter. 1 Morawetz, Priv. Corp. § 35. We therefore hold that the limitation of membership in the charter of the corporation Normanna was valid, even if it be conceded that the corporation was organized under title 2.

But the restriction of membership was for the sole benefit of the corporation. It was not a limitation upon its power for the protection of the public. There was nothing contrary to good morals or public policy in the act of the corporation in receiving into its membership non-Norwegians. The contesting defendants were in fact received as members and stockholders of the corporation.

They subscribed and paid for their stock, and accepted the certificates therefor, and permitted themselves to be held out as qualified stockholders for three years or more, and until debts were contracted and the corporation became insolvent. They are now estopped, as against creditors, from claiming that their admission to the corporation as stockholders is invalid. If creditors were chargeable with notice of the membership test contained in the charter of the corporation, much more so were the defendants when they accepted and paid for their stock. The creditors could not know that the parties appearing by the books of the corporation to be eligible stockholders were not such in fact; but such stockholders knew it. The creditors had a right to assume that the question of the eligibility of these stockholders had been passed upon by the directors of the corporation, and that they were found to be qualified. Creditors trusting the corporation subsequent to the time these defendants became stockholders are presumed to have done so upon the credit of those who appeared by the records of the corporation to be in fact stockholders.

This is not a case where the corporation had no power, under any circumstances, to issue its stock, but it is a case where the corporation, by its directors, had the power to issue the stock, and admit the holders thereof to membership in the corporation, if found to possess the necessary qualification. This case, then, is simply this: The defendants subscribe, pay for, and accept stock in the corporation, and for three years they enjoy all the rights, privileges, and advantages of membership in the corporation, and permit themselves to be held out as stockholders to those dealing with the corporation. Debts are contracted, presumably on the faith of their liability as stockholders, the corporation becomes insolvent, and then for the first time the claim is made that they are not, and could not be, stockholders, because they were not eligible to membership. It is clear that by their acts and their silence they are estopped, as to subsequent creditors, from now pleading that they are not stockholders as represented. *Olson v. State Bank*, 67 Minn. 267, 69 N. W. 904; *Veeder v. Mudgett*, 95 N. Y. 295. It follows that the defendants composing class B are liable in this action for the debts of the corporation to the amount of stock held by them.

The defendant Oswald must be added to this class, for his case, in principle, does not differ from the others. He left the matter to his agent, and it is immaterial whether he knew or not that the stock had been actually issued to him. The effect on creditors would be the same in either case. Besides, he was notified twice a year for seven years of the meetings of the corporation.

The findings of fact as to class C, the subscribers to the capital stock of the corporation, are not sufficient to establish a liability on their part on the ground of estoppel. It is only necessary to refer to the facts in support of this conclusion.

It follows that the conclusion of law of the trial court, to the effect that the defendants composing class B, who are the parties named in subdivision 12 of its findings of fact, and the defendant Oswald, were not liable for the debts of the corporation, was erroneous. In all other respects its conclusions of law were correct.

The judgment appealed from must therefore be reversed as to the defendants in class B, and as to the defendant Oswald, and the cause remanded, with directions to the district court to amend its conclusions of law so as to charge such defendants, as stockholders, for the debts of the corporation to the amount of their stock, respectively, and enter judgment against them accordingly. As to the other defendants, the judgment must be affirmed. So ordered.

CATHERINE A. CHRISTIAN and Another v. LOUIS V. KLEIN.

June 22, 1899.

Nos. 11,642—(138).

Conveyance to Wife—Action to Enforce Lien of Judgment against Husband—Evidence—Fraud.

In an action by a judgment creditor to have his judgment declared a lien upon a farm conveyed to the debtor's wife, upon the ground that he paid the purchase price, and that it was conveyed to the wife in trust for his benefit, to defraud his creditors, it is *held*, that it was error to exclude evidence to the effect that after the conveyance, and while the debtor was in possession of the farm, he made permanent improvements thereon, and paid for them with his own money.

Action in the district court for Wright county against Christina Westphal and Louis V. Klein, impleaded with her, to have certain land adjudged subject to the lien of plaintiffs' judgment. At the opening of the trial, before Tarbox, J., the action was dismissed as to Christina Westphal. The court found in favor of defendant Klein; and from an order denying a motion for a new trial, plaintiffs appealed. Reversed.

Brown, Reed, Merrill & Buffington, for appellants.

Hendrix & Merritt, for respondent.

START, C. J.¹

The plaintiffs, as judgment creditors of Herman Westphal, brought this action to have the judgment declared a lien upon a certain farm in Wright county, on the ground that the judgment debtor paid the purchase price of the land, and that it was conveyed first to his brother-in-law, and then by the latter to his wife, Christina Westphal, in trust for his benefit, to defraud his creditors. The action was commenced against the wife in August, 1895, and notice of lis pendens filed, but the action was not tried until nearly three years thereafter. In the meantime a receiver in insolvency of the estate of the wife was appointed, and the farm sold by the receiver to the defendant Louis V. Klein, who was then made a defendant to this action, and appeared and answered. The action, at the commencement of the trial, was dismissed as to Mrs. Westphal. The trial court made its findings of fact, which were to the effect that no part of the purchase price of the farm was paid by the judgment debtor, and that the conveyance was not made for the purpose of defrauding his creditors, and ordered judgment for the defendant on the merits. The plaintiffs appealed from an order denying their motion for a new trial.

Two general questions are presented for our consideration by the record. They are, that the findings of fact are not justified by the evidence, and that the trial court erred in excluding certain evidence offered on the trial by the plaintiffs. The evidence relied upon to sustain the findings of fact is not entirely satisfactory, but,

¹ CANTY, J., took no part.

as there must be a new trial for error in excluding material evidence, we forbear to discuss the evidence.

The judgment debtor, Herman Westphal, was called as a witness by the plaintiffs, and testified, in addition to other matters, that he bought the farm for his brother-in-law, H. W. Glitschka, who then lived in North Dakota, and paid \$400 on the purchase price out of the ice business in Minneapolis, which he was then conducting for Glitschka, who gave a mortgage on the farm for the balance of the purchase price; that he was in possession of the farm during the years 1893 and 1894, and paid for the improvements thereon out of the ice business; that he was not running the ice business in 1895; that the farm was deeded to his wife December 30, 1894; that he told Glitschka to deed the farm to his wife at once, which was done; that he kept the deed for a week, and then told his wife he had it, which was the first that she knew about it. He further testified as follows:

"I worked the farm in 1895; plowed and put in some crops; cleared up a little; built up some fences; shut up one well, made another; moved the house, which stood in the hole before, and we moved it up on the hill. Q. Who paid for the improvements that you put on the farm in 1895? (Objected to as incompetent, irrelevant, and immaterial. Sustained. We offer to show that he paid for the improvements that he put on that farm during the year 1895 out of his own individual money that was earned by him during that time. Same objection. Sustained. Exception.) I ran the farm up to last year. Ran it just the same as I had run it before. (We offer to show that during the years 1896 and 1897 he also ran that farm, and paid for the work and improvements out of his own individual money. Same objection. Sustained.) The Court: Did you account to Glitschka for the proceeds of the farm? A. No, sir. Q. Did you account to him for the proceeds of the ice business? A. No, sir."

The defendant seeks to sustain the exclusion of the offered evidence on the ground that it related to acts subsequent to the commencement of the action; that the evidence did not disclose the nature of his possession,—whether by lease or otherwise; and that, if he paid for the improvements with his own money, the presumption would be that he was under obligation to do so. If the fact sought to be proved was material, it was immaterial whether it related to acts done while in possession of the land before or after the

commencement of the action. If there were any facts which would rebut any inferences as to his having an interest in the land, which might otherwise be drawn from the fact offered to be proved, it was incumbent on the defendant to give them in evidence. The court could not assume their existence. Where, as in this case, fraud is the issue, great latitude should be allowed in the admission of the evidence to prove it. The offered evidence related to the acts of the judgment debtor while in possession, tending to characterize his possession of the farm, and was material and competent. It was reversible error for the trial court to exclude the evidence. See *Murch v. Swensen*, 40 Minn. 421, 42 N. W. 290; *Cortland Wagon Co. v. Sharvy*, 52 Minn. 216, 221, 53 N. W. 1147; *Lehmann v. Chapel*, 70 Minn. 496, 73 N. W. 402. It was held in the last case cited that the mere fact that the alleged title of the wife, as in this case, came from a third party, does not change the rule that such evidence is admissible. It is true, as claimed by defendant, that the cases cited are cases relating to personal property, but the principle applies to real as well as to personal property. *Bishop*, *Fraud. Conv.* § 600. The evidence offered should have been received by the trial court, and considered with all the other evidence in the case.

Order reversed, and a new trial granted.

JAMES FORSTER and Another v. COLUMBIA NATIONAL BANK and Another.

June 22, 1899.

Nos. 11,652—(194).

Action for Services—Verdict Excessive.

Evidence considered, and *held*, that the award of damages herein is grossly excessive.

Action in the district court for Hennepin county by James Forster and Edward Smith, co-partners as Forster & Smith, to recover \$11,804.10 for services rendered to defendant bank. John B. Atwater, receiver of the bank, intervened, and filed an answer on behalf of himself and of the bank. The case was tried before McGee,

J., and a jury, which rendered a verdict in favor of plaintiffs for \$891.75; and from an order denying a motion for a new trial, defendant and intervenor appealed. Reversed.

E. C. Garrigues and J. B. Atwater, for appellants.

Arthur H. Noyes and E. A. Prendergast, for respondents.

START, C. J.

The complaint herein contained four counts. The first cause of action alleged was that the plaintiffs were employed by the defendant bank, and at its request they performed services of the reasonable value of \$587.50 in the prosecution and collection of a claim which the bank had against the Walla Valley Wine Company, of Minneapolis, and that in so doing they paid as necessary expenses the sum of \$316.60. The second count was to the effect that the bank was indebted to the plaintiffs in the sum of \$150 for services rendered at its request in and about the reconstruction of its mill. The third and fourth causes of action were for services rendered to the bank of the aggregate value of \$10,750; but they are not here material, as they were dismissed by the court, and the plaintiffs acquiesced in its action.

The bank became insolvent before the commencement of this action, and a receiver thereof was duly appointed, who intervened and answered herein, denying knowledge or information sufficient to form a belief as to whether the plaintiffs ever rendered any services or paid out any money for the bank as alleged in the complaint. The answer also alleged that the plaintiff Edward Smith was a director of the bank, and, if the services mentioned in the complaint were ever rendered to the bank, they were performed by him as incidental to his position of director, and without any agreement for or expectation of payment, and not by the plaintiffs. The answer also set up, as an offset and counterclaim, a judgment against Smith for \$12,154.50, recovered by the intervenor against him on a note due to the bank. The trial court instructed the jury that the plaintiffs could not recover unless the agreement as to the services in question was made with them, and not with Smith alone. The jury returned a verdict for the plaintiffs for \$891.75. The defendant and intervenor appealed from an order denying their motion for a new trial.

The appellants here claim that the verdict is not sustained by the evidence, and that the damages awarded are excessive. The plaintiffs were, at the time the alleged services were rendered, partners as builders and contractors, and each was required to devote his entire time to the business of the firm. The services for reconstructing the bank's mill, which are the basis of the second count, were in the line of their business; and the evidence was sufficient to sustain the verdict in favor of the plaintiffs for the amount claimed, \$150. If this amount be deducted from the amount of the verdict, we have \$741.75 as the damages awarded on the first count. The evidence to support the verdict as to this first cause of action, and the assessment of damages therefor, is not satisfactory,—especially so as to the damages, and as to the finding that the contract was with the plaintiffs, and not with Smith alone. The bank had a note for \$3,000 against the wine company, and desired to take measures for its collection. Thereupon the president of the bank, Mr. Kittelson, wired the plaintiff Smith, who was then at Sioux City, Iowa, superintending the erection of a court-house for the United States, to come to Minneapolis on important business. He did so, and had an interview with the president, as to which he testified as follows:

“Q. Did the bank turn over into your name the paper it held against the Walla Valley Wine Company? A. Yes, sir. Q. State what was said in the employment of yourself, or Forster & Smith, in this Walla Valley Wine Company business. A. Mr. Kittelson proposed to sign over to Forster & Smith in the forenoon. I objected to it at the time. Objected to having the note signed over to me or the firm,—individually or to the firm. In the afternoon, after consulting with Mr. Forster, I did agree with Mr. Kittelson that the firm would undertake to collect that money,—that note,—as I had no authority personally to agree to it. Mr. Kittelson told me, or asked me, rather, if we would agree to have that note signed over to us, as the bank did not want to have a lawsuit in their name, as it didn't look well to be in the court with it. * * * I agreed to it.” He also testified that: “After I had consulted Forster, I did agree with Mr. Kittelson that my name might be used for the note, as that would not require both of us to go into court. * * * The note was signed over in my name, and we did secure an attachment on the place, and closed up the saloon and wine house the next day; and I think about four days later * * * the Walla Valley Wine Company made an assignment.”

All that was done by the plaintiffs with reference to prosecuting

the action against the wine company was done by Mr. Smith. He states that he spent seven days in the service of the bank on his first trip to Minneapolis at the time the action was commenced. He then returned to Sioux City, but was called back to Minneapolis by the president of the bank, and, as he claims, then rendered 15 days' service to the bank in connection with the actions against the wine company. He came to Minneapolis a third time, as he testifies, and devoted 12 days to the service of the bank in the matter of the collection of the claim against the wine company; and he came a fourth time to attend the trial of the action, and served the bank 12 days at this time. His traveling expenses for each trip amounted to \$20.40, or \$81.60 in all. He testified that his services were worth \$12.50 per day, and his expenses were \$5 a day. The bank paid all the expenses and disbursements connected with the prosecution of the case, including attorney's fees; hence the \$5 per day for expenses must refer to his own personal expenses while in Minneapolis.

If it be assumed that these services were rendered by Mr. Smith pursuant to a contract between the president of the bank and the plaintiffs, and that the services were outside of his ordinary duties as a director of the bank, for which he was entitled to compensation, still the plaintiffs would be entitled to receive only the reasonable value of such services as were reasonably necessary for him to render in the prosecution of the bank's claim against the wine company. The burden was upon the plaintiffs to establish, not only that the services were rendered, but that they were reasonably necessary for the protection of the interests of the bank; for they were rendered pursuant to an agreement between a director and the president of the bank, and this litigation is, in effect, between the plaintiffs and the creditors of the now insolvent bank. Now, what services did Mr. Smith actually render to the bank? The first time he came to Minneapolis he took the note to the attorney of the bank, who prepared the papers, which Mr. Smith signed and verified, and procured bondsmen to sign the attachment bond. He spent two days in investigating before the attachment was issued. He testified that he spent the entire seven days in the service of the bank, but he fails to show any reasonable necessity for his services for so long a time, or, except as stated, what he did. It

would seem that after the attachment had been levied, and dissolved four days thereafter by the assignment, his occupation was gone. His testimony as to what he did for the bank on his second trip to Minneapolis was this:

"I think I was here on the business connected with this matter on this second trip 15 days. Q. And what did you do during that time? A. I was watching the person that had charge of the Walla Valley Wine Company's place, over on Hennepin avenue. It was then in the hands of an assignee."

His testimony as to the character and extent of his services rendered on his third trip is as follows:

"The amount of time I spent in this same business on my next coming to Minneapolis was 12 days. That was the third time I was here. During those 12 days I was here, representing the bank, to buy the stock and fixtures of the Walla Valley Wine Company; and the time when I come here the sale was supposed to occur the second day, but it was postponed from day to day, * * * and I didn't want to stay here, but Mr. Kittelson wanted me to, and insisted upon it. This is how the stay happened to be so long."

As to the fourth and last term of service he testified that:

"The next time I was here in the matter was in May, 1896. I was here 12 days. During those 12 days I was prosecuting the claim of the Columbia National Bank against the Walla Valley Wine Company. I consulted with the attorneys that were employed, and got witnesses to appear in court, and just practically as if I was conducting a personal case. I worked up the case, and attended to looking after witnesses and securing the evidence."

There is no evidence in the case to show the necessity for bringing Mr. Smith from Sioux City and employing him 15 days to watch the assignee, an officer of the court, or, if a watchman was needed, why it was necessary to employ one whose time was worth \$12.50 a day, besides \$5 a day for his personal expenses, or to show why it was necessary that he should be employed for 12 days at the same rate for the purpose of attending the assignee's sale to bid on the stock and fixtures of the wine company. Nor does the record disclose why it was necessary to secure his services for 12 days in connection with the trial of the cause. If the \$81.60 paid for traveling expenses be deducted from \$741.75, the amount the jury must have

awarded on the first cause of action for his services and personal expenses for the 47 days is \$660.15, or \$14 per day. It is idle further to discuss the matter. The character and term of the services, and the fact that during the time the services were rendered Mr. Smith's home was at Minneapolis, that he was a director of the bank, that he had no personal knowledge as to the claim prosecuted, that it was assigned to him simply to enable the bank to collect it in his name, and that it employed and paid attorneys to attend to the matter, render the award of the jury, of \$14 a day for 47 days for his services and personal expenses, so grossly excessive as to justify the conclusion that it was the result of passion and prejudice, and that a new trial must be granted.

Order reversed, and new trial granted.

JACOB SCHNEIDER v. NELS ANDERSON and Another.

June 22, 1899.

Nos. 11,681—(33).

Conversion by Sheriff—Chattel Mortgage.

This action was for the conversion of live stock and other property. The plaintiff claimed title by virtue of a chattel mortgage thereon; and the defendant, as sheriff under an execution levy. It is *held*:

Pleading before Amendment of Statute—Good Faith.

The complaint stated a cause of action, and the evidence justified the court's finding that the mortgage was executed in good faith, and not for the purpose of defrauding any creditor.

Description.

A description of the property, in a chattel mortgage, which will enable a third person, aided by inquiries which the mortgage indicates, to identify the property, is sufficient. The finding of the court that the property converted was the same as that described in the mortgage is sustained by the evidence.

Affidavit of Title—G. S. 1894, § 5296.

The affidavit of title required by G. S. 1894, § 5296, to be made by a third party when he claims property levied upon by the sheriff, is sufficient if it fairly informs the officer of the general nature of the title or

claim of the party to the property. The affidavit served in this case was sufficient.

Action in the district court for Brown county against Nels Anderson, sheriff of said county, and Anton Adam for conversion. The case was tried before Webber, J., who found in favor of plaintiff; and from an order denying a motion for a new trial and from a judgment entered pursuant to the findings, defendants appealed. Affirmed.

Jos. A. Eckstein and Lind & Somsen, for appellants.

C. A. Hagberg, F. Baasen and Einar Hoidale, for respondent.

START, C. J.

Action for the conversion of certain horses, cattle, and other personal property, which was commenced December 9, 1896. The plaintiff claimed title to the property by virtue of a chattel mortgage thereon; and the defendant as sheriff by virtue of a levy thereon under an execution issued on a judgment in favor of the defendant Adam and against the mortgagor. The cause was tried by the court without a jury on October 15, 1897.

The trial court made its findings of fact to the effect that the mortgagor was indebted to the plaintiff in the sum of \$500, and for the purpose of securing its payment executed to him a chattel mortgage on the personal property described in the complaint; that the mortgage was duly filed, and that it was made, executed, delivered, and accepted in good faith by all the parties thereto, and not for the purpose of defrauding the creditors of the mortgagor, or any of them, and that it has not been paid; that the defendants on August 26, 1896, converted the property to their own use, to the damage of the plaintiff in the sum of \$577.76, for the recovery of which judgment was directed in favor of the plaintiff against the defendants. The defendants made a motion for a new trial, which was denied, and judgment entered on the findings. The defendants appealed from the order denying the motion, and from the judgment.

1. The first claim made by the defendants is that the complaint does not state a cause of action. It sets out the source of the plaintiff's title to the chattels, his mortgage thereon, and alleges that the

mortgage was duly filed and executed in good faith, and not for the purpose of defrauding any creditor of the mortgagor.

When the action was commenced and the complaint made, the statute (G. S. 1894, § 4129) provided that every chattel mortgage not accompanied by a change of possession of the mortgaged property should be void as to creditors and purchasers, unless it appear that it was duly filed and executed in good faith, and not for the purpose of defrauding any creditor. But, more than four months after the action was commenced, the complaint made, and the pleadings closed, section 4129 was amended by Laws 1897, c. 292, to the effect that it must appear that the mortgage was not executed for the purpose of "hindering, delaying or defrauding any creditor of the mortgagor." Hence the defendants urge that the complaint should have alleged that the mortgage was not executed for the purpose of hindering, delaying, or defrauding the creditors of the mortgagor, and therefore it does not state a cause of action. The complaint stated a cause of action when it was made, and the plaintiff's cause of action was then complete. If the amendment has any application to this action, it is as a rule of evidence, and not of pleading. The complaint states a cause of action.

* It is further claimed that the finding of the trial court to the effect that the mortgage was executed in good faith, and not for the purpose of defrauding creditors, is not sustained by the evidence. There was ample evidence given on the trial without objection to justify the conclusion that the mortgage was executed for the purpose of securing an honest debt, and for no other purpose. The finding is sustained by the evidence.

2. The defendants also claim that the trial court erred in finding that the property described in the complaint which was levied on by them was the same property described in the chattel mortgage. The property, as described in the mortgage, did not correspond with the description of the property in the complaint, in some particulars; but the mortgage recited that all the property was then in the possession of the mortgagor, in a specified town.

A description of the property mortgaged which will enable third persons to identify the property, aided by inquiries which the mortgage indicates, is sufficient. *Eddy, Fenner & Co. v. Caldwell*, 7

Minn. 166 (225); *Adamson v. Horton*, 42 Minn. 161, 43 N. W. 849; *Barrett v. Fisch*, 76 Iowa, 552; 14 Am. St. Rep. 239, note (s. c. 41 N. W. 310). Tested by this rule, the description of the property in the mortgage in question was sufficient to create a lien on the property described in the complaint. Any one finding the live stock described in the mortgage in the possession of the mortgagor could not well be mistaken as to its identity. On the trial there was evidence tending to identify the property taken by the defendants and described in the complaint as the same property which was described in the mortgage. This was a question of fact for the trial court, and its finding is sustained by the evidence, except as to one set of fly nets, of the value of \$1.50, which was not described in the mortgage. But it was admitted on the trial, as we understand the record, that the fly nets were a part of the mortgaged property. The trial court was certainly justified in so concluding.

3. The only remaining assignment of error meriting consideration is that the affidavit of plaintiff's claim to the property served on the defendant sheriff, as required by G. S. 1894, § 5296, was insufficient.

This statute is for the protection of the officer only, and, if it be conceded that the affidavit was insufficient, it could not affect the liability of the defendant Adam for the conversion of the property. *Heberling v. Jaggar*, 47 Minn. 70, 49 N. W. 396. The affidavit, however, was sufficient. It stated that the plaintiff was the owner and entitled to the possession of the property (describing it), and that the ground of his title thereto was a chattel mortgage, to secure the sum of \$500, executed by the mortgagor and execution debtor (naming him). It stated the date of the mortgage, and where filed, and that it was given in good faith, and that no part of the indebtedness secured thereby had been paid. It did not directly state that the mortgage was made to the plaintiff, or that the mortgagor was the owner of the property when the mortgage was given. The affidavit is not to be technically, but reasonably, construed. It fairly informs the officer of the general nature or basis of the plaintiff's title or claim to the property. The sheriff could not fail to understand that the plaintiff claimed to be the owner of the property by virtue of a chattel mortgage from the execution debtor to him, to secure the payment of \$500, no part of which was paid. The affidavit was

a substantial compliance with the statute. *Williams v. McGrade*, 13 Minn. 165 (174).

Order and judgment affirmed.

STATE v. ALFRED J. BARRY.

June 23, 1899.

Nos. 11,509—(17).

Warehouse Receipt—Contract of Bailment not of Sale.

A receipt for grain placed in store, which in all other respects constituted a bailment, contained this clause, "Which amount, and same quality by grade, will be delivered to the owner of this receipt or his order," and also provided that the grain was insured for the benefit of the owner, and that the latter should pay for storage at a certain rate. *Held*, that this receipt constituted a contract of bailment, and not one of sale.

Grand Larceny—Indictment.

Held, further, that the indictment in this case states facts sufficient to constitute the offense of grand larceny in the first degree, under Pen. Code, § 415, subd. 2.

Defendant was indicted in the district court for Meeker county for grand larceny in the first degree. The case was tried before Powers, J., and a jury, which rendered a verdict of guilty; and from a judgment entered pursuant to the verdict, defendant appealed. Affirmed.

John T. Byrnes and *M. C. Brady*, for appellant.

The language of the indictment is not sufficiently full and explicit to inform defendant of the nature and cause of the accusation. Pen. Code, § 415, points out several methods in which the crime may be committed, though it does not use the term "bailee" in connection with all. Where the definition of a crime includes generic terms, the indictment must state the species, and must descend to particulars. *U. S. v. Hess*, 124 U. S. 483; *U. S. v. Carll*, 105 U. S. 611; *State v. Howard*, 66 Minn. 309, 312. This statute defines the crime by its legal result, and does not contain its essential elements. *Wharton, Crim. Pl.* (9th Ed.) § 154; *McCann v. U. S.*, 2

Wyo. 274. The indictment should bring the case within the portion of the statute defining the offense under the conditions enumerated. *State v. Griffith*, 45 Kan. 142. See also *State v. Grisham*, 90 Mo. 163; *Gaddy v. State*, 8 Tex. App. 127; *People v. Poggi*, 19 Cal. 600; *Com. v. Smart*, 6 Gray, 15; *McCann v. U. S.*, supra; *Moore v. U. S.*, 160 U. S. 268; *People v. Cohen*, 8 Cal. 42; 1 Wharton, Crim. L. 1061; *People v. Peterson*, 9 Cal. 314. The indictment contains no direct or positive allegation that defendant was bailee of Pearson, the complaining witness. *People v. Allen*, 5 Denio, 76, 79; *People v. Tryon*, 4 Mich. 666, 667; *Gaddy v. State*, supra; *Moore v. U. S.*, supra.

Laws 1895, c. 148, was a substitute for all former acts relative to storing grain in country warehouses. It was a revision, and a substitute for pre-existing laws. *Sutherland*, St. Const. §§ 154, 155; *King v. Cornell*, 106 U. S. 395; *Smith v. County of Nobles*, 37 Minn. 535; *Giddings v. Cox*, 31 Vt. 607. It makes what was a felony a misdemeanor, and repeals the old law. *State v. Currie*, 3 N. D. 310. Its title is comprehensive, and is of moment in ascertaining the meaning of the act. *People v. Wood*, 71 N. Y. 371; *Sutherland*, St. Const. §§ 210-213.

The offense shown by the evidence does not come within the statute under which the indictment was drawn. There was a variance between the evidence and the indictment. Other persons had wheat in the elevator which was shipped out at the same time, whereas the indictment charges defendant with converting 1,077 ⁴⁰/₁₀₀ bushels of wheat the property of Nels M. Pearson. *Hall v. Pillsbury*, 43 Minn. 33, 35. Pearson was not owner, but tenant in common in the mass. Hence defendant could be indicted on complaint of each of the other tenants in common, notwithstanding that all the wheat was shipped out at one time. Such cannot be the law, for there could be but one prosecution and conviction. *Rapalje*, *Larceny & Kindr. Off.* § 117; *Hoiles v. U. S.*, 3 MacArthur, 370; *Hudson v. State*, 9 Tex. App. 151. The indictment should have contained the names of the owners of the whole amount claimed to have been taken. This difficulty is not overcome by G. S. 1894, § 7263. The complaining witness was not "in actual or constructive possession" of the wheat; nor had he a "gen-

eral or special property in the whole or any part." Property is the exclusive right of possessing, enjoying, and disposing of a thing; or ownership. *Slief v. Hart*, 1 N. Y. 20, 24; *Rigney v. City*, 102 Ill. 64, 77; *Ayers v. Lawrence*, 59 N. Y. 192, 198; *Dow v. Gould*, 31 Cal. 630, 637; *Dorman v. State*, 34 Ala. 216, 239; *Stevens v. State*, 2 Ark. 291, 299. Special property consists in the right to custody and detention against the lawful owner. *Eisendrath v. Knauer*, 64 Ill. 396, 402; *Beecher v. Allen*, 5 Barb. 169, 175. The complaining witness was absolute owner of an undivided portion. The interest in the property of the person named in the indictment as owner should not be such an interest as is incapable of identification, but a separable part, with entirety of ownership therein. *State v. Merrill*, 44 N. H. 624; *State v. Daniels*, 32 Mo. 558; *Hudson v. State*, *supra*.

The contract is a contract of sale, and not a contract of bailment. *Rahilly v. Wilson*, 1 Cent. L. J. 80; *McCabe v. McKinstry*, 5 Dill. 509; *Chase v. Washburn*, 1 Oh. St. 244; *South Australian v. Randell*, 3 Priv. C. 101; *Loneragan v. Stewart*, 55 Ill. 44; *State v. Rieger*, 59 Minn. 151; 22 Alb. L. J. 358; *Murray v. Pillsbury*, 59 Minn. 85; *Weiland v. Sunwall*, 63 Minn. 320; *Smith v. Clark*, 21 Wend. 83; *Dykers v. Allen*, 7 Hill, 497; *Hurd v. West*, 7 Cow. 752, and note; 2 Kent, Com. 589, and note; *State v. Stockman*, 30 Ore. 36; *Fishback v. Van Dusen & Co.*, 33 Minn. 111, 123.

W. B. Douglas, Attorney General, and *C. W. Somerby*, Assistant Attorney General, for the state.

The indictment is sufficient. The gravamen of the offense is the conversion. The bailment, agency, employment, etc., must be averred, but the particulars thereof need not be, because they are matters of inducement. *Bishop*, Stat. Crimes, § 422; *People v. Hill*, 3 Utah, 334; *Ritter v. State*, 111 Ind. 324; *State v. Poland*, 33 La. An. 1161; *State v. Washington*, 41 La. An. 778; *State v. Jamison*, 74 Iowa, 602, 604; *State v. Goss*, 69 Me. 22; *State v. Mohr*, 68 Mo. 303; *State v. Meyers*, 68 Mo. 266; *Lycan v. People*, 107 Ill. 423; 1 McClain, Crim. L. § 654; 2 Bishop, New Crim. Proc. § 323a; G. S. 1894, §§ 6709, 7645-7648; *People v. Page*, 116 Cal. 386; *Lowenthal v. State*, 32 Ala. 589; *People v. Johnson*, 71 Cal. 384; *State v. Com-*

ings, 54 Minn. 359, 361. Cf. *State v. Mims*, 26 Minn. 191. When the offense is statutory, and is completely defined, an indictment in the language of the statute is sufficient. *State v. Comfort*, 22 Minn. 271; *State v. Mohr*, supra; *People v. Tomlinson*, 66 Cal. 344; *People v. Mahlman*, 82 Cal. 585; *People v. Page*, supra. Where a statute expressly designates a particular class of bailees, it has been held that the indictment must contain allegations bringing the person charged within the scope of the statute; and if the statute is deficient in its definition some courts hold that the indictment should allege all the elements essential to the crime. *Terry v. State*, 1 Wash. 277; *State v. Mims*, supra. To this class belong many of the cases cited by appellant.

Laws 1895, c. 148, does not repeal by implication Pen. Code, § 415. *State v. Rieger*, 59 Minn. 151; *State v. Miller*, 140 Ind. 168; *State v. Stevenson*, 52 Iowa, 701. Repeals by implication are not favored. The acts must be inconsistent, and the repugnancy clear and unmistakable. *Moss v. City of St. Paul*, 21 Minn. 421. See also *Beal v. White*, 28 Minn. 6. The relation of bailor and bailee existed independently of G. S. 1894, § 7645. *Ardinger v. Wright*, 38 Ill. App. 98; 1 McClain, Crim. L. § 554; *Hutchison v. Com.*, 82 Pa. St. 472; *State v. Stevenson*, supra.

BUCK, J.

It is conceded by each party to this action that the defendant was indicted and convicted under G. S. 1894, § 6709, subd. 2, being same as section 415 of the Penal Code. The indictment is as follows:

"Alfred J. Barry is accused by the grand jury of the county of Meeker, in the state of Minnesota, by this indictment, of the crime of grand larceny in the first degree, committed as follows: The said Alfred J. Barry on the 26th day of December in the year 1896, at the town of Litchfield, in the county of Meeker, in the state of Minnesota, then and there having in his custody and control and possession as bailee of Nels M. Pearson, ten hundred seventy-seven and $\frac{40}{100}$ bushels of wheat, of the value of six hundred forty-seven $\frac{40}{100}$ dollars, did then and there, with the intent to defraud the owner of said wheat, and with the intent to deprive the true owner of said wheat of the same, wilfully, wrongfully, unlawfully, and feloniously appropriate the whole of said wheat to his own use, the said Nels M. Pearson being then and there the true owner of said wheat. Contrary to the form of the statute in such case made and

provided, and against the peace and dignity of the state of Minnesota.

Dated at Litchfield, in said county of Meeker, this 27th day of January, A. D. 1897.

W. M. Abbott,

Foreman of the Grand Jury."

G. S. 1894, § 6709 (Pen. Code, § 415), under which the indictment was found, is as follows:

"A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person,

"Having in his possession, custody, or control, as a bailee, servant, attorney, agent, clerk, trustee, or officer of any person, association, or corporation, or as a public officer, or as a person authorized by agreement or by competent authority to hold or take such possession, custody, or control, any money, property, evidence of debt or contract, article of value of any nature, or thing in action or possession, appropriates the same to his own use, or that of any other person other than the true owner or person entitled to the benefit thereof,—

"Steals such property, and is guilty of larceny."

During the years 1895 and 1896 the defendant operated a grain elevator at Litchfield, in this state, which was situated upon the right of way of the Great Northern Railway Company. On October 31, 1895, one N. M. Pearson deposited in the defendant's said elevator 1,077 ⁴⁰/₁₀₀ bushels of No. 10 wheat, and defendant then issued to Pearson the following receipt:

"Farmers & Merchants Elevator. No. 546.

Litchfield, Minn., Oct. 31, 1895.

Received in store of N. M. Pearson 1,077 ⁴⁰/₁₀₀ net bushels No. 1 wht. Which amount, and same quality by grade, will be delivered to the owner of this receipt, or his order, as provided by law and the rules of the railroad and warehouse commission of Minnesota, upon surrender thereof and payment of lawful charges. The established maximum rates and charges for receiving grain, insuring, handling, and storing same 15 days, and delivering, is two cents per bushel. Storage after the first 15 days one-half cent per bushel for each 15 days or part thereof, for the first three months; after the first three months, one-half cent per bushel for each 30 days or part thereof. If grain is cleaned at owner's request, one-half cent extra per bushel. This grain is insured for benefit of the owner.

1,095 bu. 55 lbs. gross.

18 bu. 15 lbs. dockage.

1,077 bu. 40 lbs. net. Grade No. 1.

A. J. Barry, Lessee,
By A. J. Barry, Agt."

After the issuing of this receipt, and before the time of finding the indictment, the defendant shipped out of the elevator all of the wheat which Pearson had deposited there, and the evidence would have justified the jury in finding that the defendant had sold it. Pearson demanded this wheat of the defendant, but he said that he had shipped it out of the elevator and sold it, and could not tell where the money had gone, and that he had no money to pay for it. It was a controverted question on the trial whether Pearson, at the time he took the wheat to the elevator, authorized the defendant to ship it out, and whether Pearson then said to defendant that he did not care what became of the wheat, only that when he demanded his money he could get eight cents per bushel below the Minneapolis price, and whether the defendant was authorized by Pearson to do what he pleased with the wheat. The jury, by their verdict, must have found that no such agreement was made between the parties, and no such authority was conferred by Pearson upon Barry.

The question then arises as to the construction to be placed upon this written instrument, dated October 31, 1895, issued by Barry to Pearson, acknowledging the receipt of the grain, and agreeing to compensate Pearson therefor. Under G. S. 1894, § 7645, this contract is a bailment, and not a sale, no matter whether the grain is mingled by the bailee with the grain of other persons or not. G. S. 1894, § 7650, provides that

"No person receiving or holding grain in store, shall sell or otherwise dispose of, or deliver out of the storehouse or warehouse where such grain is held or stored, the same, or any part thereof, without the express authority of the owner of such grain and the return of the receipt given for the same."

This last section was not repealed by Pen. Code, § 415. *State v. Rieger*, 59 Minn. 151, 60 N. W. 1087. We do not think that said section of the Penal Code was repealed by Laws 1895, c. 148, so far as bailments of grain in public warehouses are concerned. It certainly does not repeal it in terms, and, as the acts are not inconsistent or repugnant, a repeal by implication should not be permitted. Now, if the receipt of the grain under the contract in question is a bailment, then it was the duty of the defendant, upon the demand of the bailor, to deliver to him an equal amount of wheat, and of the

same quality by grade, as defendant had received of the bailor, mentioned in the receipt of contract, viz., 1,077 bushels. This he did not do, but shipped it out of the warehouse and sold it.

The case of *State v. Rieger*, supra, is cited to show that the transaction herein was a bailment, and not a sale. The receipt in that case contained many provisions similar to this one, but the one upon which the controversy arose was as follows:

"The conditions on which this wheat is received at this elevator are that J. H. Rieger has this option: Either to deliver the grade of wheat that this ticket calls for, or to pay the bearer the market price in money for the same, less elevator charges, on surrender of this ticket."

And this court held that all it amounted to was an option on the part of the defendant, when the receipt was presented, to pay the market price of the grain in specie, and that this option he could only exercise when the receipt was presented, and by paying the money. "It never contemplated that he might treat the wheat as his own, without first paying for it. If he elected to buy, it was to be a purchase for cash, and not on credit."

The case at bar is much stronger against the defendant than the case against Rieger. He had an option to buy, if he paid cash, on return of the receipt. Barry had no such right, and when the receipt was presented to him it was his duty to deliver to Pearson the same amount and same quality or grade of wheat as he (Barry) had received, or else to deliver the same wheat to Pearson. It cannot be held that under the terms of the contract the parties contemplated that Barry might sell said stored grain without the express authority of the owner and return of the receipt, nor that he might ship out the same without keeping on hand the full amount of grain of the kind and grade which Pearson had stored in said elevator, and to be delivered to Pearson upon demand, and return of the receipt, as provided by G. S. 1894, § 7647. The contract also contained a clause that the grain was to be insured for the benefit of the owner, and it cannot be doubted but that this referred to Pearson as the owner, and not to Barry. If the grain was cleaned at owner's request, one-half cent extra per bushel was to be paid therefor. The maximum rate and charge for receiving grain, and insur-

ing, handling, and storing same for 15 days, and delivery, was two cents per bushel; and a less rate for a greater number of days. These facts tend to strengthen the theory that the parties contemplated by the terms of the contract that it was a bailment and not a sale of the grain.

The defendant contends that a variance exists between the indictment and the evidence, for the reason that the contract in question contemplated a mingling of the wheat (that is, a mingling of Pearson's wheat with that of others), and that the same must be described in the indictment as a mass owned in common by Pearson with others. We need not enter upon any discussion of this question, for no such fact appears in the record. The claim is mere guesswork, as will appear by a careful examination of the evidence, and it need not be considered.

The further point is made by the defendant that the indictment is insufficient in this: that it charges that he committed the offense as bailee, without setting out the particular facts constituting the bailment, and that there is no direct, positive allegation that the defendant was the bailee of N. M. Pearson, the complaining witness. The indictment charges that, at the time of the larceny of the wheat, Pearson was the true owner of the wheat; that the defendant had it in his custody, control, and possession as bailee of Pearson; that while having the wheat, viz. 1,077 ⁴⁰/₁₀₀ bushels, in his custody, control, and possession as bailee, Barry, with intent to defraud the owner of said wheat, and deprive Pearson of the same, wilfully, wrongfully and unlawfully and feloniously appropriated the said wheat, of the value of \$647.60, to his own use. Here we have the averment of ownership, bailment, agency, employment, description of property, value, and felonious appropriation thereof to his own use with the intent to defraud, and the time and place stated with certainty. What more was necessary to convey to the defendant complete notice of the offense with which he was charged, and to enable him to prepare for his trial upon the allegations in the indictment?

We should be loath to compel a person charged with a criminal offense to go to trial under an indictment which would prove to be a snare or mislead him to his injury, for human life and human

liberty are too dear to be the subjects of uncertain, insufficient, or improper allegations in an indictment; but the frequent attempts to hinder the speedy prosecution of criminals by raising trivial and technical objections to their prosecution is a source of great annoyance and irritation to our law-abiding citizens, if not full of danger to the state in which we live. Under this indictment the defendant is informed of the nature and cause of the accusation against him, and, if convicted of the offense charged, he could not again be put in jeopardy of punishment for the same offense. The offense charged is that of grand larceny in the first degree, under the statute; and the defendant is accused of having committed this offense when acting in relation to the property of Pearson in a fiduciary capacity, and whose property he had wrongfully converted to his own use in a manner made felonious by the statute. This is the gravamen of the charge, and it is distinctly alleged in the indictment; but the allegations need not be extended beyond the statutory terms, although those terms must be so far pursued as to identify the statute and comprehend the offense in full. The bailment must be averred, but, on principle, the particulars of it need not be averred, because it is a matter of inducement, and the general allegation will suffice. Bishop, St. Crimes, § 422. Nor was it necessary to charge how Pearson became the owner of the property, as the allegation that he was the owner covered all necessary facts in this respect,—as much so as if the indictment had alleged how and when he became such owner. And the same may be said as to the charge that Barry was the bailee of Pearson.

As we hold that said section 415 of the Penal Code is in full force, an indictment properly drawn under it for grand larceny in the first degree and a conviction therefor is punishable under the statute. It may be that the defendant might have been indicted, convicted, and punished under another section of the statute for this identical offense, but that fact would not of itself render this indictment invalid. The section under which it is conceded that the defendant was indicted covers cases where the offense consists in a bailee violating his trust by feloniously converting to his own use property of the owner which the bailee holds in a fiduciary capacity. Where there are two legislative enactments, under each of which an indict-

ment may be found against a person for the same offense, neither law is thereby unconstitutional or invalid, but a conviction and punishment under one act would be a bar to such proceedings under the other law for the same offense. We are of the opinion that the indictment states facts sufficient to constitute the offense of grand larceny in the first degree, under Pen. Code, § 415, subd. 2. *State v. Comings*, 54 Minn. 359, 56 N. W. 50.

Judgment and order affirmed.

L. K. DEVLIN v. JAMES McMILLAN & COMPANY.

June 26, 1899.

Nos. 11,596—(137).

Assignment for Benefit of Creditors—Garnishee of Assignee.

Action in the district court for Hennepin county against Jas. McMillan & Co., defendant, and Albert F. Helliwell, garnishee, to recover \$257.25 on a draft. From an order, Harrison, J., discharging the garnishee and denying plaintiff's motion for leave to file a supplemental complaint, plaintiff appealed. Affirmed.

Warner, Richardson & Lawrence, for appellant.

Jayne & Helliwell, for respondent.

PER CURIAM.

This question involves no question of law not decided in the case of *Armour Packing Co. v. Brown*, 76 Minn. 465. Counsel for appellant claim that the facts in the two cases are dissimilar, in that in the former case the assignment was made by a corporation, by its president and secretary, pursuant to a resolution of its board of directors authorizing them to make only an assignment under our insolvency laws for the benefit of its creditors, while in the latter case the assignment was by an individual. This does not distinguish the cases, for in each the only assignment made was one pursuant to the insolvency law for the benefit of creditors releasing their claims. This case is therefore ruled by that of *Armour Packing Co. v. Brown*.

Order affirmed.

NEW HAMPSHIRE SAVINGS BANK v. NANCY B. BARROWS.

June 26, 1890.

Nos. 11,624—(159).

Judgment against Husband not a Lien upon Wife's Third—G. S. 1894, § 4472.

Held, the failure of the widow to elect, under G. S. 1894, § 4472, to renounce the provision made for her in the will of her deceased husband, and take under the statute, does not have the effect of giving to her late husband's judgment creditor a lien on the land which would descend to her under the statute, and the lien of such judgment is in no manner affected by her election or failure to elect.

Action in the district court for Hennepin county to determine adverse claims to land. The case was tried before Harrison, J., who found in favor of plaintiff; and from a judgment entered pursuant to the findings, defendant appealed. Reversed.

Wm. H. Hallam, for appellant.

C. A. Bucknam, for respondent.

CANTY, J.

Defendant claims an undivided one-third of the land in controversy as her statutory dower. At the time of her husband's death, and for a long time prior thereto, he was the owner of the land in fee simple. Before his death the plaintiff bank recovered a judgment against him for the sum of \$1,319.02. The judgment was docketed, and became a lien on the land. He left a will in which he devised and bequeathed to defendant all his property, both real and personal, and appointed her sole executrix. The will was probated, letters testamentary were issued to her, and she administered the estate. The time in which to file claims was fixed, the time expired, plaintiff did not file its claim, and it never was allowed by the probate court. Thereafter plaintiff levied execution on the land, sold the same at execution sale, the time to redeem expired, and no redemption was made. Plaintiff, claiming to be the owner of the whole of the land, brought this action to determine the adverse claims of defendant. On the trial the court found for

plaintiff, and held that defendant had no right or interest in the land. From the judgment entered accordingly, defendant appeals.

G. S. 1894, § 4472, provides, in substance, that when a parent dies testate, having by his or her will made provision for the surviving husband or wife in lieu of the interest secured to such survivor by statute, unless such survivor within six months after the probate of the will does, by instrument in writing filed in the probate court, renounce and refuse to accept the provision made by the will, such survivor will be deemed to have elected to take under the will, and in accordance with the terms thereof. It is further provided that no devise or bequest to any surviving husband or wife shall be construed to be in addition to the statutory interest of such survivor, unless such clearly appears from the contents of the will to have been the intention of the testator or testatrix. Three of his children survived the testator, and the widow never filed any such renunciation within the six months, or at all.

Respondent contends that for this reason the surviving widow took by purchase, and not by descent, and that, therefore, respondent's judgment became a lien on her statutory one-third of the land, so that the sale on execution passed title to the whole when the year to redeem expired. In our opinion, defendant's election, or failure to elect, could not in any manner affect the lien of respondent's judgment. Before the death of the judgment debtor, the judgment was an absolute lien on two-thirds of the land, and a contingent lien on the other one-third. If she died before her husband, this contingent lien would become absolute; but, if he died first, such lien would cease. He did die first, and therefore the lien of the judgment on this one-third did cease. The rights of the parties then became fixed. A judgment lien cannot be acquired on the land of the judgment debtor after his death. *Byrnes v. Sexton*, 62 Minn. 135, 64 N. W. 155. Therefore the failure of the widow to elect within the six months could not operate to give plaintiff a lien which it did not have at the time of, and immediately after, the death of the judgment debtor.

This disposes of the case, and it is not necessary to consider further the purpose or effect of section 4472.

The judgment is reversed, and the case remanded, with direction to the court below to enter judgment on the findings of fact, adjudging that plaintiff is the owner in fee simple of an undivided two-thirds of the land in question, and that the defendant is the owner in fee simple of the other undivided one-third thereof.

GEORGE H. SELOVER v. FIRST NATIONAL BANK OF MINNEAPOLIS.

June 26, 1899.

Nos. 11,654—(197).

Evidence.

Conceding, without deciding, that certain evidence introduced is incompetent, and that it was error to admit it, it was error without prejudice, because the fact sought to be proved by it was conclusively proved by other evidence.

Bank—Fraud—Estoppel.

H. fraudulently, and by means of false pretenses, procured a loan from the defendant bank, and requested it to credit the amount to its correspondent bank for his benefit. This defendant did, by notifying the correspondent bank accordingly. Thereupon the latter bank credited the amount on the antecedent debt of H. *Held*, defendant was not by reason thereof estopped, as against the latter bank, from rescinding the loan, and cancelling the credit so extended to the latter bank for the benefit of H.

Appeal by plaintiff from an order of the district court for Hennepin county, Elliott, J., denying a motion for a new trial. *Affirmed.*

Robert Jamison and Douglas A. Fiske, for appellant.

Gilfillan, Willard & Willard, for respondent.

CANTY, J.¹

During all the time hereinafter stated, prior to February 25, 1895, the defendant, the First National Bank of Minneapolis, Minnesota, was a correspondent of the Merchants' Bank of Lake City, Minnesota, and one Holmes was the president of the latter bank. On February 15, 1895, Holmes borrowed of the defendant bank the

¹ MITCHELL, J., absent.

sum of \$4,000, for which sum he then executed his note to that bank, and, as collateral security for the loan, assigned and delivered to that bank 50 shares of the capital stock of the Merchants' Bank, of which stock he was then the owner. Each bank kept an open account with the other, and Holmes directed the defendant bank to credit the account of the Merchants' Bank with the proceeds of the loan, amounting to \$3,940. Thereupon, on the same day, the defendant bank wrote the Merchants' Bank as follows: "We credit your account \$3,940, proceeds W. F. Holmes note."

Ten days thereafter, on February 25, the attorney general commenced an action to forfeit the charter of the Merchants' Bank on the ground that it had loaned to Holmes, directly and indirectly, over \$30,000,—a sum greatly in excess of 15 per cent. of the total amount of the capital stock of that bank. A receiver of the assets of the bank was thereupon appointed, and its doors were closed on that day. In the meantime the credit so given the Merchants' Bank by the defendant bank remained upon the books of both banks, and had not been drawn upon by the Merchants' Bank. On said February 25 the defendant bank notified both Holmes and the Merchants' Bank that defendant had rescinded the loan to Holmes, and cancelled the credit so given to the Merchants' Bank, and defendant then tendered back to Holmes the 50 shares of stock so delivered to it as collateral security. The receiver made no attempt to collect the amount of this credit from defendant, but thereafter, on March 1, 1898, he sold the claim to plaintiff for the sum of \$75; and plaintiff brought this action to recover the amount of the claim, to wit, the sum of \$3,940, and interest thereon. On the trial the court, sitting without a jury, found for defendant, and from an order denying a new trial plaintiff appeals.

The defense that was interposed is that Holmes obtained the loan from the defendant bank by means of false and fraudulent representations; that at the time of negotiating the loan he represented that the stock so offered as collateral security was worth par, to wit, the sum of \$5,000, whereas in fact such stock was wholly worthless, which he then well knew, and made the representations with intent to deceive defendant, who believed the representations, and, relying on them, was induced thereby to make the

loan. To avoid the effect of this defense, the plaintiff claims that, on the faith of the credit so given by defendant to the Merchants' Bank, it gave credit to Holmes, cancelled a check which it held against him, and put itself in a worse position than it would have been in if such credit had not been given to him as a result of such loan; that, therefore, defendant is estopped, as against the Merchants' Bank and this plaintiff, from setting up such defense. The evidence amply warranted the court in finding that the representations were made with the intent aforesaid; that defendant relied on them, and was by them induced to make the loan. The only evidence tending to show that the stock was worthless on February 15, 1895, was that the Merchants' Bank was insolvent on February 25, 1895, and that its affairs were in substantially the same condition on the former date as on the latter.

1. Appellant assigns as error the admission of certain evidence introduced for the purpose of showing such insolvency. The court permitted evidence to be introduced of the testimony of Moore, the receiver, given by him on the trial of another action between other parties, in which he stated the total amount of the assets of the defunct bank, and the total amount of its liabilities, when he took possession. Admissions of Moore to the vice president of defendant to the effect that its repudiation of the claim was just were also received in evidence. After the action was commenced by the attorney general, a creditor of the Merchants' Bank intervened in that action, and filed a complaint to enforce the stockholders' super-added liability. It is alleged in that complaint that the Merchants' Bank was insolvent on February 25. This plaintiff, who is an attorney at law, signed that complaint as the attorney of the intervening creditor. We do not deem it necessary to pass on the admissibility of any of this evidence. There is other evidence in the case which tends to prove that the Merchants' Bank was insolvent at the time aforesaid, and plaintiff did not offer a particle of evidence to rebut the same, or to prove that the bank was not insolvent at such time. Therefore the evidence is conclusive that it was then insolvent, and, if it was error to admit the evidence objected to, it was error without prejudice.

It appears by the report of sale made by the receiver, offered in

evidence by the plaintiff, that the greater portion of the assets of the defunct bank was sold at a very small price. Among the assets so sold were several promissory notes made by Holmes, which sold for about one dollar for every \$1,000 thereof. Plaintiff made in said intervention proceedings an affidavit for the purpose of having additional parties brought in, and it is stated in the affidavit that certain stockholders are liable for certain amounts on their superadded liability. On the trial, plaintiff stated that he made this statement on the assumption that ultimately the assets would not be sufficient to pay the debts. He then further testified:

“Q. That the assets of the bank on hand on February 25 were not sufficient to pay the liabilities of the bank on that day? A. Why, I think so. I was acting as attorney for one of the creditors, as sufficiently indicated in that paper.”

This evidence of the insolvency of the Merchants' Bank is corroborated in some slight degree by almost every line and page of testimony in the case, and is wholly uncontradicted.

2. In our opinion, the trial court did not err in holding that, on the faith of the credit given by defendant to the Merchants' Bank for the benefit of Holmes, the latter bank did not part with anything which can be urged here as the basis of any such estoppel against defendant.

For the purpose of making it appear that the indebtedness of Holmes to the Merchants' Bank was much less than it really was, the sum of \$12,627.87 of that indebtedness was, on the books of that bank, charged to the First National Bank of Casselton, North Dakota. There never was any foundation for any such charge, and the latter bank was at that time indebted to the former in the sum of \$27.80, and no more. Besides this fictitious charge against the Casselton bank, the Merchants' Bank kept in its drawer a check drawn by Holmes on the former bank in favor of the latter bank for the sum of \$4,000. This check was never entered on the books of the latter bank, and was never presented for payment to the former bank, which knew nothing about the existence of this check, or of the false charge on the books of the latter bank. This was the con-

dition of things February 15, 1895, when defendant informed the Merchants' Bank that it had been credited with the \$3,940 for the benefit of Holmes. Thereupon, on the faith of this, the Merchants' Bank credited Holmes' account with \$4,000, credited the fictitious account against the Casselton bank with the same amount, and surrendered to Holmes the check aforesaid; he having at the same time given the Merchants' Bank a new check for \$60. In our opinion, the trial court was warranted in finding, and we may assume that it did find, that the \$4,000 check so kept in the drawer was given by Holmes, and held by the Merchants' Bank, merely for the purpose of keeping up false appearances, and was a part of the same scheme in pursuance of which it made the false charges in its books. Neither plaintiff nor the Merchants' Bank can predicate any estoppel on the fact that such bank used the credit thus extended as a pretext for taking down some of these false colors.

But the fact still remains that, by reason of the giving of such credit by defendant to the Merchants' Bank, the latter was induced to give Holmes credit to the amount of \$3,940 on his antecedent indebtedness to the latter bank. In our opinion, this alone will not constitute a sufficient ground for such an estoppel. According to the weight of authority, it is sufficient to protect the indorsee of negotiable paper, taken in good faith before maturity, that the same was taken in payment of or as security for an antecedent debt. *Rosemond v. Graham*, 54 Minn. 323, 56 N. W. 38; 4 Am. & Eng. Enc. (2d Ed.) 285. But the Merchants' Bank was not protected by any such doctrine of negotiability, and neither is plaintiff. As against either of these, the payment of the antecedent debt of Holmes to the latter bank is not sufficient to shield it or plaintiff from the defendant's defense; but, as against either of these, the defendant is entitled to make any defense which it could have made against Holmes himself. This disposes of all the questions raised having any merit.

Order affirmed.

CHARLES WARREN v. LUTHER MENDENHALL.

June 26, 1899.

Nos. 11,658—(176).

77	145
180	151
180	178

Personal Injury—Fire Department—Taking Risks.

Held, the duties of a member of the city fire department, when driving fire apparatus on a call to a fire, may require him to take risks which it would be negligence for a private person to take in pursuit of his private business.

Same—Collision with Street Car—Negligence.

In an action by such a member against a street-railway company for damages for an injury to him resulting from a collision, at a street crossing, between a street car and a hook and ladder truck driven by him, *held*, that the question of defendant's negligence and of his contributory negligence were both for the jury.

Action in the district court for St. Louis county against defendant, as receiver of the Duluth Street Railway Company, to recover \$5,200 damages for personal injuries. The case was tried before Moer, J., who directed a verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Reversed.

John Jenswold, Jr., for appellant.

Defendant was bound to use the same care in preventing a collision as the driver of any other vehicle would be bound to use. *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395. The car had no priority at the street crossing. *Watson v. Minneapolis St. Ry. Co.*, 53 Minn. 551. Defendant's violation of the ordinance, being the proximate cause of the injury, was negligence for which he was liable. *Bott v. Pratt*, 33 Minn. 323; *Rosse v. St. Paul & D. Ry. Co.*, 68 Minn. 216; *Osborne v. McMasters*, 40 Minn. 103. Where the motorman cannot see more than a short distance ahead, it is his duty to have the car under such control as to be able to stop as soon as he shall see an approaching fire truck. *Cooke v. Baltimore*, 80 Md. 551; *La Pontney v. Shedden*, 116 Mich. 514. The motorman failed to exercise active vigilance. *Anderson v. Minneapolis St. Ry. Co.*, 42

Minn. 490; *Strutzel v. St. Paul City Ry. Co.*, 47 Minn. 543; *Weissner v. St. Paul City Ry. Co.*, 47 Minn. 468. The fact that he had reason to expect the approach of the fire department was a cogent reason for his looking up the avenue. *Anderson v. Minneapolis St. Ry. Co.*, *supra*; *Strutzel v. St. Paul City Ry. Co.*, *supra*.

There was no contributory negligence. *Flannagan v. St. Paul City Ry. Co.*, 68 Minn. 300; *Kolsti v. Minneapolis & St. L. Ry. Co.*, 32 Minn. 133. The standard of reasonable care for one crossing a street-car track is different from that for one crossing a steam railroad. *Johnson v. St. Paul City Ry. Co.*, 67 Minn. 260. Even failure to look is not as matter of law negligence. *Shea v. St. Paul City Ry. Co.*, *supra*; *Holmgren v. Twin City R. T. Co.*, 61 Minn. 85. Firemen on the way to a fire are not bound by the ordinary standard. *Booth, St. Ry.* § 318; *Magee v. West End*, 151 Mass. 240; *Elyton v. Mingea*, 89 Ala. 521; *Pennsylvania v. Langendorf*, 48 Oh. St. 316; *Cottrill v. Chicago*, 47 Wis. 634; *Wilson v. Great Southern*, 41 La. An. 1041; *Coots v. City*, 75 Mich. 628; *Garrity v. Detroit*, 112 Mich. 369. Any one has a right to assume that cars will approach crossings with caution. *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438; *Watson v. Minneapolis St. Ry. Co.*, *supra*; *Little v. Street*, 78 Mich. 205; *Holmgren v. Twin City R. T. Co.*, *supra*. Proof of a general custom is competent on the question of plaintiff's negligence. *Lawson v. Truesdale*, 60 Minn. 410; *Flanders v. Chicago, St. P., M. & O. Ry. Co.*, 51 Minn. 193; *Steffenson v. Chicago, M. & St. P. Ry. Co.*, 51 Minn. 531; *Armstrong v. Chicago, M. & St. P. Ry. Co.*, 45 Minn. 85; *O'Malley v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 289; *Larson v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 423; *Doyle v. St. Paul, M. & M. Ry. Co.*, 42 Minn. 79; *Kolsti v. Minneapolis & St. L. Ry. Co.*, *supra*. Persons in great peril are not required to exercise the same care as persons under ordinary circumstances. *Pennsylvania v. Snyder*, 55 Oh. St. 342; *Haney v. Pittsburgh*, 38 W. Va. 570; *Bischoff v. Peoples*, 121 Mo. 216; *Lincoln v. Nichols*, 37 Neb. 332; *Fehnrich v. Michigan*, 87 Mich. 606; *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262. Plaintiff's contributory negligence was for the jury. *Bennett v. Syndicate Ins. Co.*, 39 Minn. 254; *Emery v. Minneapolis Ind. Ex.*, 56 Minn. 460; *Leonard v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 63 Minn. 489; *Corbin v. Winona & St. P. R. Co.*,

64 Minn. 185. Plaintiff had a right to assume that the motorman would obey the ordinance. *Leonard v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, *supra*; *Klotz v. Winona & St. P. R. Co.*, 68 Minn. 341. He had a right to assume that the motorman would follow the general custom. *Westaway v. Chicago, St. P., M. & O. Ry. Co.*, 56 Minn. 28; *Sobieski v. St. Paul & D. R. Co.*, 41 Minn. 169. See *Thomas, Neg.* 394; *Little v. Hackett*, 116 U. S. 366; *Houston v. Richart* (Tex. Civ. App.) 27 S. W. 918; *Howe v. Minneapolis, St. P. & S. Ste. M. Ry. Co.*, 62 Minn. 71; *Finley v. Chicago, M. & St. P. Ry. Co.*, 71 Minn. 471.

Thomas S. Wood, for respondent.

The rights of persons who meet at the intersection of streets are fixed by *Shea v. St. Paul City Ry. Co.*, 50 Minn. 395, 399. See also *Watson v. Minneapolis St. Ry. Co.*, 53 Minn. 551, 557; *Anderson v. Minneapolis St. Ry. Co.*, 42 Minn. 490, 492. No negligence can be attributed to the motorman for not looking up the avenue. *Booth, St. Ry.* § 306; *Kennedy v. St. Louis*, 43 Mo. App. 1, 4; *Thomas v. Citizens*, 132 Pa. St. 504. He can be charged only with ordinary vigilance. *Hearn v. St. Charles*, 34 La. An. 160; *Gallagher v. Crescent*, 37 La. An. 288, 291; *Bulger v. Albany*, 42 N. Y. 459; *Boland v. Missouri*, 36 Mo. 484, 492; *Hestonville v. Connell*, 88 Pa. St. 520; *Philadelphia v. Henrice*, 92 Pa. St. 431; *Booth, St. Ry.* § 306; *Lawrence v. Pendleton*, 1 Cin. Sup. Ct. 180.

Plaintiff was guilty of contributory negligence. Had a passenger in the car been killed, plaintiff would have been held negligent. What would be negligence in that case is contributory negligence in this. *McGee v. Consolidated*, 102 Mich. 107; *Fritz v. Detroit*, 105 Mich. 50; *People v. Little*, 86 Mich. 125; *Carson v. Federal*, 147 Pa. St. 219. See *State v. Sheppard*, 64 Minn. 287; *Watson v. Minneapolis St. Ry. Co.*, *supra*. The same precautions should be taken when crossing an electric street railway as a steam railroad. *Carson v. Federal*, *supra*; *Ehrisman v. East*, 150 Pa. St. 180. That plaintiff was a member of the fire department on the way to a fire does not absolve him from contributory negligence. *Greenwood v. Philadelphia*, 124 Pa. St. 572. See *Wood, Ry.* 1518.

CANTY, J.¹

Plaintiff was employed by the fire department of the city of Duluth as the driver of a hook and ladder truck. While responding to a fire alarm on September 7, 1898, the truck, which plaintiff was driving on one street, came in collision with defendant's electric street car, running on its track on a cross street, whereby plaintiff was injured. He brought this action to recover damages for the injury, on the ground that the same occurred by reason of defendant's negligence. At the close of the evidence, the court ordered a verdict for defendant, and from an order denying a new trial the plaintiff appeals.

The street car was running on the south track on Superior street, which extends east and west. The fire truck was running on Lake avenue, which extends north from the north line of Superior street, and from that line extends across Superior street in a south-south-west direction, and continues in that direction, so that on the north side of Superior street the two streets intersect at right angles, but on the south side they intersect at oblique angles. The street car was approaching this crossing from the west, and the truck was approaching it from the north. There was a three-story brick block on the northwest corner, which cut off plaintiff's and the motorman's view of each other as they each approached the crossing; and by reason of this, and the change in the direction of Lake avenue at the north line of Superior street, the motorman approached within about 35 feet of the point of collision before he could have seen the approaching truck coming down Lake avenue, if he had looked in that direction. Lake avenue is 66 feet wide, and Superior street is 80 feet wide. For about a block north of Superior street, the grade of Lake avenue is 11 or 12 feet to the 100, sloping down towards Superior street. The hook and ladder truck was 47 feet long, from the end of the pole or tongue to the end of the longest ladder, and weighed, with its equipment, about 6,500 pounds. There were, besides, five men on the truck, which, with its load, was drawn by two horses down this steep grade. The horses and the front end of the truck passed in front of the moving car,

¹ MITCHELL, J., absent.

and then the car struck the rear wheel of the truck, threw the rear end of the truck around, resulting in injury to plaintiff, and in the death of two other firemen, who were riding on the truck.

All of the witnesses agree that the car was moving slowly,—some say, no faster than a slow walk; others say, no faster than four miles per hour. There is a switch in the street-car tracks in Superior street, 58 feet west of the west line of Lake avenue north. The east-bound cars always run slowly over this switch, and there is testimony tending to prove that the car in question stopped at this switch. There is a conflict of testimony as to how fast the fire truck came down Lake avenue. Some of plaintiff's witnesses testify that the horses were on a slow trot, and others testify that the rate of speed was about seven or eight miles an hour; while some of plaintiff's witnesses testify that the truck came down pretty fast,—at a pretty lively gait,—and others testified that it came down at a furious gait. There is testimony tending to prove that the car could have been stopped almost instantly. There was a brake on the front wheels of the truck, to be worked by the driver's foot; and there is testimony tending to prove that plaintiff had set the brakes as hard as he could, and that the horses were holding back in the breeching as much as they could, but that this combined force was not sufficient to hold back the heavy truck, which pushed them along out of a trot into a gallop. Plaintiff himself so testified. The testimony also tends to prove that there was a gong, 16 or 18 inches in diameter, on the truck, and that it was sounded continuously as the truck came down Lake avenue; that the gong could be heard from one to four blocks; and that the gongs on two other fire trucks or carts, following immediately behind the one plaintiff was driving, were being also continuously sounded. Plaintiff and the men on his truck saw the car when he was about 140 feet away from the point of collision.

As to what plaintiff did at this time he testified as follows:

"Q. What did you do when you noticed that car? A. Why, I held my horses in check as far as I could, and when I see that the car was not likely to stop, it was too late for me to come to a standstill, and the car was in such a position that there was no chance of my turning either east or west, and my only opening was to

cut in front of it, and get past it, and get into Lake avenue south. There was an opening there, and it was the only opening that we had. Q. Then what did you do? A. In about 15 or 20 feet of the sidewalk on Superior street, I gave my horses more rein. Q. What effect did that have upon it? A. It probably increased our speed two miles an hour. Q. You tried to shoot by the car that way? A. Yes, sir. Q. Before that, and after you saw the car, did you see any people down on the street there? A. Yes, sir. Q. Did you notice what they were doing? A. They were holding up their hands, motioning the car to stop. Q. Did you notice the rate of speed the car was going there? A. Yes, sir; it was running very slowly. I would judge a walk,—a common man's walk. Q. What did you expect, as to whether it would stop or not? A. I expected it to stop every instant from the time I saw it as they usually—That is, my experience has— Q. What have you noticed about the custom of street cars, that way, to stop, and give the fire department the right of way at crossings? A. I have always noticed their stopping on the approach of any fire apparatus. * * * Q. When you saw the car first, did you notice the motorman? A. Yes, sir. Q. Which way was he looking when you first saw him? A. Looking south. Q. Did you see him look any other way than that? A. I did not. Q. He was looking south all the time that you were coming down Lake avenue? A. Seemed to be; yes, sir. Q. Until you passed in front of the car? A. Yes, sir; from what I could see. Q. You could see him? A. Well, at the time I passed in front of the car, I might not have seen him. Q. Well, up until it passed in front of the car? A. Yes. Q. He never looked in your direction once, did he? A. Not that I noticed. Q. Weren't you noticing him? A. Yes. Q. You never saw him turn his head towards you? A. I did not. Q. How far is the Tremont House from Superior street? Do you know? A. It is about—about 180 or 190 feet to the upper side to the alley; 80 or 90 feet, and the Tremont House is below a little; to the lower side of the Tremont House may be 150 feet, from the center of Superior street. Q. At any time after you saw the car, did you attempt to stop the truck? A. No, sir; I can't say as I did. Q. You thought the car would stop, and you would get by, didn't you? A. I did. Q. You thought that this person in the street would succeed in stopping the car, and let you by? A. I did; yes, sir. Q. You thought you would take the chance, and go in front of it? A. Yes, sir."

Several witnesses testified that a number of the bystanders, who saw the car and truck coming towards the point of collision, yelled, shouted, and motioned to the motorman to stop. One Little testified as follows:

"What next did you observe and do? A. Well, I run across the

street, and I says, 'I am going to try and stop that car, or there may be a collision.' I went across the street, and I got practically in front of the car, and throwed up my hands to stop the car, and I pointed up the hill, and hollered to them to stop, the fire department was coming. I stayed there until the car came within four or five feet of me, and I got off the track, and I seen he wasn't going to stop; so I stepped to one side."

These witnesses further testified that the motorman paid no attention to these efforts to warn him. The motorman testified that he did not hear the shouts or see the motions; that he did not see the fire truck until the horses were almost on the track in front of his car; that then he stopped it almost instantly; that, just before he saw the horses, he had been looking south down Lake avenue.

We are of the opinion that, under these circumstances, the question of the motorman's negligence was for the jury. We are also of the opinion that the question of whether or not plaintiff was guilty of contributory negligence was for the jury, although we regard this as rather a close question. The fact that plaintiff was driving, down a steep grade, a very heavy truck, which he was not able to control completely, has, in our opinion, no tendency to show that he was not guilty of contributory negligence, but, on the contrary, has a tendency to show that he was guilty of such negligence. As between him and defendant, it is immaterial whether he owned the truck himself, or was driving it as the servant of the city. If he was driving a vehicle which was so unwieldy and unmanageable that it was dangerous to drive it on the public streets, and this was the cause of the collision, he cannot blame the defendant; but whether or not this was the cause of the collision is a question for the jury.

In our opinion, the jury were warranted in finding that, even if plaintiff's truck was not unmanageable and dangerous, he would have been justified in driving as fast as he did, and in attempting (until too late to avoid the collision) to pass in front of the car as he did. It is often the duty of a fireman, when attending a fire or responding to a fire alarm, to act, regardless of a considerable degree of danger to himself. To hesitate or stop at every slight indication of danger might often be a dastardly failure of duty on his

part. His duties are of a public character, and in cities of a considerable size these duties are exceedingly important. On many occasions, his instant and fearless action is imperatively necessary to prevent widespread disaster, the loss of property, or the loss of life, or both; and, when he is called, he seldom knows the urgency of the occasion until he arrives upon the ground. Plaintiff had the right of way. An ordinance of Duluth, in force at the time, reads as follows:

"All apparatus belonging to the fire department of the city of Duluth, when attending a fire or an alarm of fire, shall have the right of way on any and all streets, avenues, alleys, or public grounds; and all persons driving vehicles of any kind, except cars upon tracks, shall turn entirely off the center of the street, and stop until such apparatus shall pass; and it shall be the duty of any conductor, driver, or person in charge of any car upon any track, upon the approach of any such apparatus when proceeding to a fire, to immediately stop such car until such apparatus shall pass."

But, speaking for myself alone, I will say that I am of the opinion that such right of way would be implied, without the aid of any such ordinance. See *State v. Sheppard*, 64 Minn. 287, 67 N. W. 62.

Of course, such a fireman must use ordinary care. Ordinary care is care commensurate with the occasion; and, when the dangers are great, it may be a very high degree of care. When a fireman's duty requires him to take great risks, the rule of ordinary care may require him to be exceedingly alert and watchful to prevent injury to himself and others, but still that rule may not prohibit him from venturing into the danger. If a private citizen, pursuing his private business, had attempted to pass in front of this street car as plaintiff did, we are clearly of the opinion that it should be held, as a question of law, that he was guilty of contributory negligence, and could not recover. But the fire department is a well-known public institution. As its vehicles rush along the street, and the gongs are sounded fast and furiously, it is customary for every one else to be alert to give these vehicles the right of way, and this custom grows out of imperative necessity. See *Magee v. West End*, 151 Mass. 240, 23 N. E. 1102; *Wilson v. Great Southern*, 41 La. An. 1041, 6 South. 781. See also as bearing on the questions

here discussed, *Cottrill v. Chicago*, 47 Wis. 634, 3 N. W. 376; *Pennsylvania v. Langendorf*, 48 Oh. St. 316, 28 N. E. 172. As before stated, ordinary care may require the drivers of these vehicles, on such occasions, to be also very alert to avoid injury to themselves and others. Whether, under these rules, plaintiff was guilty of contributory negligence, is a question for the jury.

Order reversed and a new trial granted.

DENNIS BOYLE and Another v. P. MUSSER and Others.

June 26, 1899.

Nos. 11,685—(195).

Driving Intermingled Logs—G. S. 1894, § 2466.

In an action under G. S. 1894, § 2466, to recover compensation for driving the logs of defendants, which had become intermingled with the logs of plaintiffs, it appeared that plaintiffs did not drive the intermingled logs to a place where they could be conveniently separated, because, before arriving at such a place, they reached the limits in the river beyond which a boom company was exercising exclusive control in driving all logs floating down the river. The intermingled logs then passed into the control of the boom company, and were driven by it to its booms, where they were separated. *Held*, plaintiffs drove and caused the logs to be driven to a place where they could be separated, and are entitled to recover.

Same—Log Mark—Record Owner—License.

Said section gives a right of action against the person in whose name the logs are recorded. The log mark was recorded in the name of "Musser, Sauntry & Co.," a partnership which had been dissolved, and the mark was placed on these logs with the consent of one of the former partners. *Held*, he is liable.

Same—Evidence of Clean Drive.

Held, the evidence warranted the jury in finding that plaintiffs made practically a clean drive of the intermingled logs. When plaintiffs' logs and a portion of defendants' logs became intermingled, the other portion of defendants' logs were further up the stream above plaintiffs' logs, and not intermingled with them. The latter portion of defendants' logs were to be driven down the same season. *Held*, under these circumstances, it

was not necessary for plaintiffs to make as clean a drive of defendants' logs as they should have made if no more of the same logs were to come down the same river that season.

Same.

Held, the evidence warranted the jury in finding that plaintiffs drove defendants' logs in good faith, and in the same manner and as far as plaintiffs should have driven their own under the circumstances.

Action in the district court for Washington county against P. Musser, William Sauntry, and others, as copartners as Musser, Sauntry & Co., to recover \$6,750 and interest for driving logs mingled with logs of plaintiffs. William Sauntry and W. M. Cain, copartners as Sauntry & Cain, intervened. The case was tried before Williston, J., and a jury, which rendered a verdict in favor of plaintiffs and against Sauntry as defendant, and against intervenors, for \$4,724.80; and from an order denying a motion for a new trial, defendant Sauntry and intervenors appealed. Affirmed.

Clapp & Macartney, for appellants.

J. N. Searles and Sullivan & Manwaring, for respondents.

CANTY, J.¹

This is an action under G. S. 1894, § 2466, to recover compensation for driving logs intermingled with the logs of the plaintiffs. They recovered a verdict against William Sauntry and W. M. Cain, who appealed from an order denying a new trial.

1. The logs in question were driven down the Kettle river, and from the mouth of that river 25 miles further down the St. Croix river to Never's dam. From the head of this drive down to the booms of the St. Croix Boom Corporation, some considerable distance below Never's dam, there was no place at which the intermingled logs could be separated. This is conceded by all parties. The plaintiffs did not drive the logs down to these booms, or any further than Never's dam, and appellants contend that for this reason plaintiffs cannot recover. So far as here material, said section 2466 reads as follows:

"That any person who shall desire to float to market or place of

¹ MITCHELL, J., absent.

manufacture any logs or timber in any of the streams of this state, and who shall be hindered and obstructed in so doing by the logs or timber of another, or any person whose logs or timber, in any of the waters of this state, are so intermixed with the logs or timber of another that the same cannot be conveniently separated for the purpose of being floated to the market or place of manufacture, may drive all logs or timber with which his own is or may be obstructed or intermixed, towards such market or place of manufacture to some point where the same can be conveniently separated from his own."

Appellants contend that, as the statute provides for driving the intermingled logs "to some point where the same can be conveniently separated," and as plaintiffs did not do so, they cannot recover under the statute.

It appears by the evidence that in 1891 the St. Croix Lumbermen's Dam & Boom Company was organized under the laws of Wisconsin for the purpose of improving the navigation of the St. Croix river for a distance of about 40 miles above the boom limits of the St. Croix Boom Corporation. Immediately after the organization of the dam and boom company, it erected a large dam in the river, just below Yellow Pine Rapids, so as to raise the water in the river, back up over the rapids a distance of about 13 miles, and for the purposes of log navigation the company has ever since taken and held exclusive possession of the river from the head of this slack water down to the point below the dam where the St. Croix Boom Corporation takes charge of the floating logs. The first-named company handles a vast amount of logs every year, and charges a toll of 10 cents per 1,000 feet for taking charge of the logs, floating them down over its dam, and delivering them to the last-named company at some point below. Since Never's dam was built, it has been the uniform custom of those driving logs down the Kettle river and down the St. Croix river to deliver the logs to the dam and boom company at the head of the slack water above Never's dam, and pay that company the customary toll for driving the logs from that point down to where the logs were delivered by that company to the boom corporation.

Appellants offered to prove that they paid such toll on the logs here in question. On the oral argument appellants' counsel ques-

tioned the right of the dam and boom company to exclude loggers from driving their own logs over the portion of the river so improved by that company, but on what ground they question that right does not appear. We will not consider the legality of the claims of the dam and boom company. For the purposes of this case, it was either a de jure or a de facto corporation, exercising the rights it asserted, the public has so far submitted, and we will assume that it is legally exercising those rights. A number of boom companies in this state are, under their several charters, legally exercising such powers, and no one can drive his own logs through the portion of the river of which one of those companies has possession for the purpose of driving logs, but owners must surrender their logs to the company, to be driven by it through such portion.

Does section 2466 apply in such a case, when it is necessary to drive the logs down through such a portion of the river before reaching a place where they can be conveniently separated? We answer in the affirmative. The legislature never intended to deny compensation to a person who has driven intermingled logs in such a case, and allow such compensation in other cases. If such person has driven the logs as far as the law permitted him, and then caused them to be driven by the boom company the rest of the way to a place where they can be conveniently separated, he has sufficiently complied with section 2466. This the plaintiff did. It is immaterial that the appellants paid the toll on their own logs, otherwise plaintiffs might have paid it, and have collected the amount in this action or in an action for that purpose. This disposes of the first two assignments of error.

2. Section 2466 further provides that the person driving such intermingled logs shall be entitled to compensation for driving the logs not his own, and that he

“May have and maintain a civil action for the amount of such claim * * * against the owner of such logs or timber, or any person in whose name such mark shall be recorded.”

The mark of the logs here in question was recorded in the name of “Musser, Sauntry & Co.,” a partnership. It is claimed by ap-

pellants that these logs were in fact owned by a corporation which was the successor of the partnership. The third assignment of error is as follows:

"The court erred in instructing the jury as follows: 'If the jury find that William Sauntry, in the fall of 1895, knew of the mark M Two Diamonds being recorded in the name of the partnership Musser, Sauntry & Co., and consented that such mark should be put on the logs in question in this action, then Sauntry would be liable as defendant, though his co-partner might not be, if the plaintiffs establish their cause of action in other respects,' because the log mark was not recorded in the name of William Sauntry, but in the name of the defunct co-partnership of which Sauntry had once been a member, and Sauntry was no more bound by the recording of the log mark in that name than he would have been if he had consented to its being recorded in the name of any other individual."

In our opinion, the court did not err in giving the charge in question. The name of the partnership in substance and effect included the name of the defendant Sauntry. Therefore he is liable. See *O'Brien v. Glasow*, 72 Minn. 135, 75 N. W. 7.

3. The fourth assignment of error is as follows:

"The court erred in instructing the jury, in substance, that the plaintiffs had no right to, and were not required to, drive any logs at any point in the river unless they were logs that had been previously taken possession of by the plaintiffs as a part of the mixed mass of logs in the stream, and that the plaintiffs were not required to take off wings of M Two Diamond logs, or intermixed logs that were not obstructing the driving of the stream, and that they might leave such logs where they consisted of logs that had not previously been taken into the plaintiffs' drive as a portion of the intermixed mass, because: (a) Such charge assumes that the jury had before them some evidence to determine whether or not a given body of logs which was left and not driven out had not been taken possession of by the plaintiffs as an intermixed body of logs, when in fact the evidence shows that it would have been impossible for witnesses present at the time the driving took place to determine that fact. (b). Because such charge assumes the law to be that, although the plaintiffs might take charge of a given body of intermixed logs, and start them down the stream, yet if any of such logs should become separated from the plaintiffs' logs, so that thereafter the plaintiffs' logs might be driven without driving those of the defendants, then, in that case, the defendants' logs might be left."

We will concede, for the purposes of the case, that this assignment of error correctly states the substance and effect of the court's charge on the point therein stated. It will be observed that two reasons are stated why this part of the charge is erroneous. In our opinion, the first reason, marked "(a)," is untenable.

There is evidence in the case from which it might be held that the person making the drive could not tell whether the intermingled logs claimed to have been left had ever been taken possession of by plaintiffs or not, but there is other evidence to the contrary. A part of this is evidence to the effect that plaintiffs took practically a clean rear out of Kettle river; that is, that they made practically a clean drive from the point where their logs became intermingled with the logs here in question. There is evidence tending to prove that plaintiffs drove their own logs past a large number of logs of the same mark (M Two Diamonds) as the logs here in question before the condition came about which warranted plaintiffs in attempting to drive their own logs and the logs here in question from that point forward, leaving behind all the logs of this mark which they had passed as aforesaid, and with which their own logs had not become intermingled. Under these circumstances it was not necessary for plaintiffs to make as clean a drive as they should have made of the logs here in question, if no more of the same logs were to follow over the same course during the same season. But appellants intended to drive the balance of the logs of this mark down this river the same season, and had at the time in question taken their driving crew further up the Kettle river for that purpose, as plaintiffs then knew. Again, the evidence tends to prove that the enormous quantity of logs then in the Kettle river made it necessary and proper that only a part of the logs should be driven down at a time.

The second reason, marked "(b)," why such part of the charge is erroneous, is wholly untenable. There is no evidence tending to prove that in any considerable or material portion of the intermingled logs the logs of plaintiffs became separated from the logs of defendants after plaintiffs undertook to drive such portion of the intermingled logs. It is not at all likely that such intermingled logs would thus separate of their own accord.

4. The fifth assignment of error is that the court erred in denying the motion for a new trial,

“Because all of the evidence shows that the plaintiffs did not, especially in the year 1896, drive the logs marked M Two Diamonds in good faith and in the same manner as they drove their own as far as they drove their own, and the verdict is therefore clearly against the great weight of the evidence.”

In our opinion, the evidence warranted the jury in finding that plaintiffs did drive the logs in good faith, and in the same manner as they should have driven their own under the circumstances. We cannot take the time or space to review the 580 pages of evidence in the paper book for the purpose of showing on what we base that conclusion, but, after examining the same, that is our conclusion. This disposes of the case.

Order affirmed.

DAVID C. HULL v. CHARLES E. CHAPEL and Others.

June 28, 1899.

Nos. 11,687, 11,688—(199, 203).

77	159
81	516
81	518

77	159
85	139

Bond of Sheriff—Release of Sureties—Failure to Pay over Money.

A sheriff having received, on redemption from a mortgage foreclosure sale, money belonging to the plaintiff, duly tendered payment thereof to plaintiff's agent, who had full authority to demand, receive, and receipt for the same, but the agent, without any just or lawful reason, refused to accept or receive the money. Subsequently the plaintiff demanded payment of the money from the sheriff, which he refused to make. In an action on the sheriff's official bond to recover the money, *held*, that the sureties were released from liability by the refusal of the plaintiff's agent to receive the money when tendered by the sheriff; that the subsequent refusal of the sheriff to pay the money on demand did not revive their liability, or constitute a new breach of the bond, which rendered them liable for the nonpayment of the same fund which had been previously tendered and refused.

Same—Discretion of Court.

Held, also, that upon the facts the court was not guilty of any abuse of

discretion in opening a default judgment, and granting the defendants leave to answer.

Action in the district court for Ramsey county to recover \$1,548.50 on a sheriff's bond executed by defendant Chapel as principal and by the other defendants as sureties. Defendants Chapel and Merriam answered, and the issues arising under their answers were tried before Brill, J., who found in favor of plaintiff and against defendant Chapel, and in favor of defendant Merriam. From a judgment entered pursuant to the findings, and also against defendants Warner and Kittelson, who had failed to answer, plaintiff appealed. Subsequently a motion was made by defendants Warner and Kittelson to open the judgment and for leave to answer, and from an order, Kelly, J., granting said motion, plaintiff appealed. Judgment and order affirmed.

John E. Stryker, for appellant.

The sheriff received the redemption money by virtue of his office. *In re Grundysen*, 53 Minn. 346. The tender to plaintiff's attorney did not relieve the sheriff from his liability. *Moulton v. Bowker*, 115 Mass. 36. The attorney had no implied authority to release his client's cause of action or security, or the surety from the debt. *Mandeville v. Reynolds*, 68 N. Y. 528; *Ritch v. Smith*, 82 N. Y. 627; *Story*, Ag. § 99; *Mechem*, Ag. §§ 813, 819; *Cram v. Sickel*, 51 Neb. 828; *Armstrong v. Hurst*, 39 So. C. 498; *Davis v. Severance*, 49 Minn. 528. One dealing with an attorney is bound to take notice of the scope of his authority. *Cox v. New York*, 63 N. Y. 414, 419. The attorney was also acting for a second mortgagee, and could not bind his client when so acting against his interest. *German Ins. Co. v. Independent School Dist. of Milford*, 80 Fed. 366; *Mechem*, Ag. §§ 66, 67.

Tender, to be effectual, must be kept good. *Dunn v. Hunt*, 63 Minn. 484. Tender is not payment, but only releases mortgage security or discharges a party secondarily liable. The liability of a surety on an official bond is a debt. *Bay v. Cook*, 31 Ill. 336, 348. It is direct and not collateral. *Cassady v. Trustees*, 105 Ill. 560. To discharge a surety, there must be an agreement by which the right of the injured party to enforce fulfilment of the contract is

suspended. *Reynolds v. Ward*, 5 Wend. 501; *King v. Baldwin*, 2 Johns. Ch. 554, 559. Delay does not discharge. *Fulton v. Matthews*, 15 Johns. 433; *Andrus v. Bealls*, 9 Cow. 693; *Warner v. Beardsley*, 8 Wend. 194. Each demand without payment resulted in a new default. See *Six Carpenters Case*, 8 Coke, 432. The rule that tender deprives a creditor of his security is a hard one at best, nor are the authorities agreed. *Moore v. Norman*, 43 Minn. 428; *Dunn v. Hunt*, *supra*. The burden is on him who relies on a tender not kept good to show that all conditions have been complied with. *Union Mut. L. Ins. Co. v. Union Mills P. Co.*, 37 Fed. 286; *Post v. Springsted*, 49 Mich. 90; *Waldron v. Murphy*, 40 Mich. 668; *Renard v. Clink*, 91 Mich. 1.

Laws 1895, c. 329, providing that a bailee may relieve himself from liability by deposit in court, applies to this case. The word "may" should be construed "must." *Fowler v. Pirkins*, 77 Ill. 271; *Seiple v. Mayor*, 27 N. J. L. 407. When noncompliance with such a statute can work injury to anyone affected by it, the requirement cannot be dispensed with. *Koch v. Bridges*, 45 Miss. 247. Omission by a public official to perform an act prescribed by a directory statute renders him liable to anyone injured by his failure. *Brown v. Lester*, 21 Miss. 392; *French v. Edwards*, 13 Wall. 506, 511. The tender proved did not release the sureties. *State v. Alden*, 12 Ohio, 59.

Defendants Warner and Kittelson were not entitled to have the judgment opened. The negligence of the agent or attorney was no excuse. *Waddell v. Wood*, 64 N. C. 624; *Stewart v. Cannon*, 66 Minn. 64; 1 Black, Judg. § 341; *Norwood v. King*, 86 N. C. 80; *Moore v. Horner*, 146 Ind. 287. The court will not encourage carelessness. *Noye M. Co. v. Wheaton R. M. Co.*, 60 Minn. 117; *Mueller v. McCulloch*, 59 Minn. 409; *Glaeser v. City of St. Paul*, 67 Minn. 368. The defense of the defaulting defendants is not meritorious.

John F. Fitzpatrick and Walter L. Chapin, for respondents.

Tender by a principal to his creditor releases the sureties. *Johnson v. Mills*, 10 Cush. 503; *M'Questen v. Noyes*, 6 N. H. 19; *Sears v. Van Dusen*, 25 Mich. 351; *Joslyn v. Eastman*, 46 Vt. 258; *Curia v. Packard*, 29 Cal. 104; *Spurgeon v. Smitha*, 114 Ind. 453;

Fisher v. Stockebrand, 26 Kan. 565; Life v. Neville, 72 Ala. 517; Sharp v. Miller, 57 Cal. 415; Johnson v. Ivey, 44 Tenn. 608; Smith v. Old Dominion, 119 N. C. 257. See also Moore v. Norman, 43 Minn. 428. The tender to the agent was tender to the principal. Fisher v. Stockebrand, *supra*. It was not necessary for the tender to be kept good. Johnson v. Ivey, *supra*; Smith v. Old Dominion, *supra*; Moore v. Norman, *supra*. The rule releasing sureties applies to sureties on bonds. Johnson v. Mills, *supra*; Sharp v. Miller, *supra*. The case of State v. Alden, 12 Ohio, 59, relied on by plaintiff, stands alone.

The application to remove the default was addressed to the discretion of the court. St. Mary's Hospital v. National Ben. Co., 60 Minn. 61. See Martin v. Curley, 70 Minn. 489.

MITCHELL, J.

The defendant Chapel having been elected sheriff of Ramsey county, he, as principal, and the other defendants, as sureties, executed an official bond, conditioned that Chapel should well and faithfully in all things perform and execute the duties of sheriff according to law during his continuance in office. This is an action on the bond to recover the sum of \$1,548.50 belonging to the plaintiff, which was received by Chapel as sheriff upon the redemption from a mortgage sale at which the plaintiff was purchaser, and which it is alleged Chapel has failed and refused to pay over to the plaintiff, although repeatedly requested so to do. There are two appeals,—one from a judgment dismissing the action as to the defendant Merriam, and the other from an order opening the default of the defendants Warner and Kittelson to answer.

1. The facts material to the appeal from the judgment are as follows: Promptly after Chapel received the money, and in December, 1895, he duly and unconditionally tendered payment of the same to plaintiff's agent, who had full authority to demand, receive, and receipt for the same in his behalf, but such agent, without any just or lawful reason, then and there refused to accept or receive the money. Subsequently, on three different occasions, viz. July, 1896, December, 1896, and June, 1897, the plaintiff duly demanded payment of the money from Chapel, which on each of these occasions

he refused to make. The sole question is whether, upon these facts, the sureties were released.

The rule is well settled that if the principal, after the debt is due, duly tenders payment, and the creditor refuses to receive it, the surety is discharged. One of the reasons sometimes assigned for this rule is that the transaction amounts to a payment of the debt, and a new loan to the principal. But doubtless the main reason for the rule is that the contract of suretyship imports entire good faith and confidence between the parties in regard to the whole transaction, and any bad faith on part of the creditor will discharge the surety. The refusal of the creditor to receive the money is a fraud on the surety, which exposes him to greater risk. After the debt is due and payable, the creditor cannot, by his unjustifiable refusal to accept payment from the principal, compel the surety to continue responsible for the future acts of the principal as his debtor or bailee of his money. If it were otherwise, the creditor would have it in his power to keep the surety liable indefinitely. At least as to private debts and unofficial bonds, it cannot be necessary to cite authorities on the proposition. In such case it is not necessary, in order to release the surety, that the principal should keep the tender good. It is the refusal of the tender which works the release. Neither is it material that the tender was made to and refused by the duly-authorized agent of the creditor, instead of the creditor in person. Having made the agent his alter ego, pro hac vice the creditor is bound and affected by the agent's acts in that regard the same as if they were his own personal acts. Neither does the mere fact that the liability of the surety is upon a bond constituting a continuing guaranty of the fidelity of the principal alter the rule, although, of course, in such a case, conduct on part of the creditor which will release the surety from one breach of the bond by the principal will not release him from liability for subsequent and independent breaches. Therefore, if the sureties in this case are not released as to the claim of the plaintiff, it must be because of some distinction or difference between the liability of sureties for a private debt or on an unofficial bond and their liability on an official bond.

A sheriff's bond has a dual character, or, more properly speak-

ing, it is designed to secure the performance of two classes of official duties, viz. those due the public as such and those due private persons for whom he is called on to perform official work. While the bond runs to the state as the nominal obligee, yet the real obligees or beneficiaries are not only the state or county, but also any person for whom the sheriff is called upon to perform an official duty. If this action was brought by the state or county to recover on the bond for a breach of it with reference to some duty which the sheriff owed the public in its organized capacity, and the refusal of the tender had been by some other public officer, a very different principle would be involved. But the breach here complained of was of a duty owing to a private individual, and one in which no one but he had any interest. As respects such a liability, we fail to see why the same acts on the part of the creditor which would release a surety on a private bond should not also release a surety on a sheriff's official bond.

The contention of the plaintiff is, in substance, that the bond was a continuing guaranty of the official conduct of the sheriff; that the refusal of the sheriff on demand, subsequent to the tender, to pay over the money, was a new breach of the conditions of the bond, for which the sureties are liable. But it seems to us that this overlooks the fact that the duty which the plaintiff demanded the sheriff to perform was the same one of which the sheriff had previously tendered performance, and which the plaintiff had, in violation of the rights of the sureties, refused to accept; and that, if he had accepted it, as he ought, the debt would have been paid, and no subsequent default of the sheriff as to that debt could ever have occurred. The violation of the rights of the sureties consisted of the refusal of the tender, and, if that released them, it is impossible to see how a subsequent change of mind and demand on part of the plaintiff could revive their liability as to that debt, or undo the harm done by the prior refusal of the tender.

The only case cited by plaintiff's counsel which tends to support his contention is *State v. Alden*, 12 Ohio, 59, in which it was held that, where a sheriff absconds with money in his possession, collected on execution, having previously made a tender to the party entitled, who refused to receive it, such tender and refusal is no de-

fense to the sheriff's sureties in a suit upon his official bond. The opinion in that case is very brief, and no authorities are cited. The line of reasoning adopted was as follows:

"The principle of discharge, arising from an act done by the creditor, prejudicial to the surety, does not apply. An ordinary suretyship is a mere contingent obligation, for the payment of money, in default of the principal. The securities upon an official bond guaranty the faithful performance of official duty. The payment of money, and other acts done by the creditor, injurious to the surety, may discharge the one, but the faithful and honest performance of official duty alone can fulfil the condition of the other. The fact of tender and refusal does not convert the official trust into a mere private liability for a money demand. The obligation to pay over money received by a sheriff in his official capacity, continues an official duty until performed by payment to the party entitled. As long, then, as the obligation to pay continues an official duty, so long were the securities responsible for its violation, upon their bond."

We confess our inability to understand this line of reasoning, unless it means that no acts or conduct on part of a creditor or other private party interested in the official conduct of a sheriff will release the sureties on his bond until and unless the sheriff has fully performed his whole duty in that regard by paying the money to the party entitled to it,—a proposition which we think will be found to be without support in any other adjudicated case.

2. The defendants Warner and Kittelson having failed to answer within the time allowed by law, judgment was entered against them on default October 7, 1898. Subsequently, on their motion, the court made an order opening the judgment, and allowing them to answer. The only question on the appeal from this order is whether, in making it, the court abused its discretion.

The motion was heard on affidavits and counter affidavits, which reasonably tended to show the following state of facts: Within two or three days after the service of the summons upon them in May, 1898, these two defendants had an interview with their principal, Chapel, in regard to the action, in which he, in substance, told them that they need not give it any attention, and promised them that he would attend to it for them, and have his attorney interpose an answer for them, and that, relying on this promise,

they omitted to serve any answer in their own behalf, and that they never knew that any judgment had been entered against them until in December, 1898. Their affidavits to the above effect were accompanied by their proposed answer, and were corroborated by that of Chapel, who also swore that he did instruct his attorney to serve an answer in the action for Warner and Kittelson similar to the one served for himself and Merriam. This attorney, having enlisted in the military service of the United States, retired from the case in the late spring or early summer of 1898, whereupon Chapel and Merriam employed their present counsel. It appears from the counter affidavits interposed in behalf of the plaintiff that Chapel had notice that no answer had been served in behalf of Warner and Kittelson at the time of the trial of the issues between the plaintiff and himself and Merriam on the last day of June or the first day of July. Very shortly after learning that judgment had been entered against them, and some time early in December, Warner and Kittelson employed counsel to apply to have the judgment opened, and to obtain leave to answer. The preparation of the motion papers was somewhat delayed by sickness of counsel and the absence of Chapel from the city, but notice of a motion to be heard January 7, 1899, was served during the last days of December, 1898.

We cannot see that these defendants were guilty of any personal negligence, unless it was in trusting to their principal to attend to the matter for them. But this is the most natural thing in the world for sureties to do, as their principal owes them at least the moral duty to do so, and is ordinarily the only one conversant with the facts. Chapel was doubtless guilty of negligence and great disregard for the interests of his own sureties in failing to take steps to relieve them from the default after he ascertained at the trial of the action that his original attorney had failed to interpose an answer in their behalf; but this does not militate so strongly against the defendants as if it had been their own personal negligence. It appears from the whole case, as well as from their answer, that they have a good defense which is meritorious, and not merely technical, as suggested by plaintiff's counsel. It was a somewhat broad stretch of judicial discretion to relieve them from

their default, but, under all the circumstances, we do not think we would be warranted in holding that it amounted to an abuse of discretion.

Judgment and order affirmed.

SCHOOL DISTRICT NO. 47 IN WASECA COUNTY v. CARL WEISE and
Another.

June 28, 1899.

Nos. 11,700—(106).

Injunction—Title to Office—Trustees of School District.

While proceedings by injunction cannot be used to determine disputed title to offices, they may be used to protect the possession of officers de facto against the interference of claimants whose title is disputed until they shall establish their title by appropriate judicial proceedings, at least when the title is doubtful, or the facts upon which it depends are disputed and uncertain. Whether an injunction would lie where it conclusively appears that the incumbent is not an officer de jure, and that the claimant is entitled to the office, *quære*. *Held*, that in this case an injunction was properly refused, at least because it did not appear that the petitioner was still the actual incumbent of the office.

Action in the district court for Waseca county to enjoin defendants from acting as trustees of plaintiff school district. The case was tried before Buckham, J., who found in favor of defendants; and from a judgment entered pursuant to the findings, plaintiff appealed. Affirmed.

F. B. Andrews and John Moonan, for appellants.

The title of Henderson and Roesler cannot be tried in this action. If they were officers de facto, this action would lie to prevent defendants from intruding into the offices till the title of such de facto officers should be determined in a proper legal proceeding. *Burke v. Leland*, 51 Minn. 355; *Dickey v. Reed*, 78 Ill. 261; *Muhler v. Hedekin*, 119 Ind. 481; *Osgood v. Jones*, 60 N. H. 543; *Demarest v. Wickham*, 63 N. Y. 320; *Throop*, Pub. Off. § 850. One who obtains office with the legal indicia is a legal officer till ousted.

Board v. Benoit, 20 Mich. 176. There cannot be two incumbents. *Hallgren v. Campbell*, 82 Mich. 255. If defendants are entitled to prevail, it must be found that Henderson and Roesler had acquiesced in their removal and in the election of defendants as their successors. *Hallgren v. Campbell*, *supra*. The finding that Henderson and Roesler were acting as such trustees holding office is in effect a finding that they duly qualified. *Throop*, Pub. Off. § 171; *First v. Township*, 46 Mich. 526. Injunction will lie to prevent defendants from intruding till they have established their titles at law. *Guillotte v. Poincy*, 41 La. An. 333; 1 High, Inj. (2d Ed.) § 315; *Brady v. Sweetland*, 13 Kan. 41; *Palmer v. Foley*, 45 How. Pr. 110; 2 Beach, Inj. § 1380; *State v. Superior*, 17 Wash. 12; *Ehlinger v. Bankin*, 9 Tex. Civ. App. 424. Henderson and Roesler are at least *de facto* officers. 5 Wait, Act. & Def. 7; *Bucknam v. Ruggles*, 15 Mass. 180; *Com. v. McCombs*, 56 Pa. St. 436; *State v. Howe*, 25 Oh. St. 588; *Brady v. Theritt*, 17 Kan. 468; *State v. Mayor*, 52 N. J. L. 332; *People v. Ferris*, 76 N. Y. 326; *Matter of Gardner*, 68 N. Y. 467; *People v. Lane*, 55 N. Y. 217; *People v. Mayor*, 3 Johns. Cas. 79.

Election by acclamation at a regular meeting where such officers were to be elected was at most an irregularity, and merely voidable. *Throop*, Pub. Off. § 633; *Fulton v. Town of Andrea*, 70 Minn. 445. On the question of vacancy when defendants claim election, see *Cronin v. Stoddard*, 97 N. Y. 271; *State v. Thompson*, 9 Oh. C. C. 161.

P. McGovern, for respondents.

MITCHELL, J.

The material findings of fact are as follows: At the annual school meeting held in the above district on July 20, 1897, the terms of office of director and treasurer of the district had expired, and by acclamation one Henderson was elected director and one Roesler treasurer of the district, but no ballot was had to fill either of the offices, nor was any ballot cast for either of the persons above named. After such election by acclamation, Henderson and Roesler acted as trustees of the district until the next annual school meeting, held June 18, 1898, at which time, by ballot, in accordance with law, the defendants Bushow and Weise were respectively

elected director and treasurer of the district, and thereafter each of them accepted the office to which he was elected, and duly qualified as such. During all this time one Edward Weise was the duly elected and qualified clerk of the district. At the annual school meeting in June, 1898, the legal voters of the district voted to change the location of the school house to a more central site. After their election as trustees of the district, the two defendants and Weise, the district clerk, were intending to hold a meeting as trustees to consider and act upon the determination of the voters in reference to changing the school-house site, but before such meeting was held, or any action taken by them as trustees under such resolution or otherwise, they were served with an injunction issued in this action, and in obedience thereto they have ever since refrained from acting in the capacity of trustees of the school district.

This action was brought by Henderson and Roesler in the name of the district to enjoin the defendants from acting or attempting to act as trustees of the district. Upon the above findings of fact the court held, as a conclusion of law, that the plaintiffs were not entitled to a permanent injunction, and ordered that the temporary injunction be dissolved, and the action dismissed on the merits.

The pretended election of Henderson and Roesler by acclamation was clearly invalid, because the statute expressly provides that such elections must be by ballot. G. S. 1894, § 3677. Therefore it was the right as well as the duty of the voters of the district to elect a director and a treasurer at the annual school meeting held in June, 1898. The defendants were respectively elected to these offices at the meeting, and have accepted the offices, and qualified as such. They are therefore the de jure trustees of the district, and Henderson and Roesler have no right to the offices.

The position of the latter is that they are still in possession of the offices as de facto officers, and that, while proceedings by injunction cannot be used for the purpose of determining a disputed title to an office, yet they may be properly used to protect the possession of officers de facto against the interference of claimants whose title is disputed until they shall establish their title by appropriate judicial proceedings. This would seem to be a very

reasonable rule in cases where the facts upon which the title to the office depends are disputed and uncertain, but it would seem anomalous for a court of equity to exercise its preventive jurisdiction in favor of one who, upon the undisputed facts, had no right to retain possession of an office against another who, upon the equally undisputed facts, was entitled to it.

But assuming, without deciding, that the rule invoked by appellants is as broad in its application as they claim for it, the facts found (which is all we have before us) are insufficient to bring them within it. There is no finding that the appellants are still actual incumbents of these offices. The findings of the court are merely that they acted as trustees until the annual school meeting in 1898, at which the defendants and respondents were elected; that thereafter the latter accepted the offices, and duly qualified as such, and that since that election both parties have claimed to be trustees of the district with authority to act as such; but there is no finding that since such election the appellants have assumed to exercise any of the powers or perform any of the duties pertaining to the office. It further appears that the clerk, who has possession of the records of the district and of the board of trustees, recognizes and co-operates with the respondents as lawful members of the board. When a party who clearly has no right to an office is invoking the equitable powers of the court against one who, upon the established facts, is clearly entitled to it, if he has any right at all to the aid of the court, he ought, at least, to establish positively, and in no uncertain terms, that he is the actual incumbent of the office.

Judgment affirmed.

CANTY, J.

I concur in the result. The claimant in possession of the office cannot bring quo warranto against the claimant out of possession, because he, the former claimant, is in possession, and he has no remedy but to resort to equity for an injunction to prevent the latter claimant from forcibly ousting him. But, under the old practice, the equity court had no jurisdiction to try the title to the office, and all it could do was to enjoin the claimant out of

possession until he should establish his right to the office in a court of law. No such difficulty exists under our practice, where law and equity are administered by the same court in the same action. When the court takes jurisdiction for the purpose of issuing such an injunction, there is no reason why it should not go on and try the rights of the parties to the office. Therefore I am of the opinion that the claimant in possession is not entitled to such an injunction, unless he shows that he has a better right to the office than the claimant whom he seeks to enjoin. This the plaintiff did not do, and the judgment should be affirmed.

MAXIMILIAN GAGNE v. MINNEAPOLIS STREET RAILWAY
COMPANY and Others.

June 28, 1899.

Nos. 11,704—(185).

77	171
f82	20

Street Railway—Bicycle Rider—Contributory Negligence.

In an action for damages for the death of plaintiff's intestate, caused by the alleged negligence of the motorman of one of defendant's cars, *held*, that the evidence was conclusive that the deceased was guilty of contributory negligence.

Evidence of Wilful Negligence.

Also, that there was no evidence that the motorman was guilty of any wanton or wilful negligence in failing to make proper efforts to avoid injury after he discovered the deceased in a place of danger.

Action in the district court for Hennepin county by plaintiff, as administrator of the estate of Ferdina Gagne, deceased, against Twin City Rapid Transit Company, St. Paul Street Railway Company, and Minneapolis Street Railway Company, doing business as Twin City Rapid Transit Company, to recover \$5,000 on account of the death of decedent. The case was tried before McGee, J., and a jury, which rendered a verdict for \$2,500 in favor of plaintiff and against Minneapolis Street Railway Company,—the action having been dismissed as against the other defendants. From an order granting a motion for judgment notwithstanding the verdict in favor of defendant, plaintiff appealed. Affirmed.

Penney & McMillan and A. B. Ovitt, for appellant.

Koon, Whelan & Bennett, for respondent.

MITCHELL, J.

Plaintiff's intestate was killed by one of defendant's cars on the Interurban Line at or near the intersection of University and Malcolm avenues, and this action was brought to recover damages on the ground that the death of the deceased was caused by the negligence of defendant's motorman who was operating the car. The trial resulted in a verdict for the plaintiff, and on defendant's motion the court, under Laws 1895, c. 320, ordered judgment in favor of the defendant notwithstanding the verdict, whereupon the plaintiff appealed.

The accident occurred about three o'clock in the afternoon. The deceased was a middle-aged man, in full possession of all his faculties, and entirely familiar with the location and the manner in which the cars were run on that line. University avenue at that point is 120 feet wide. In the center of it the defendant has double tracks, on the northerly one of which the cars going west, or to Minneapolis, run, and on the southerly one the cars going east, or to St. Paul. The Interurban cars are large and heavy, weighing about 30,000 pounds, and one passes each way at intervals of from six to ten minutes. The surrounding country being suburban in its character, the cars are accustomed to run at a higher rate of speed than in the more thickly-populated parts of the two cities. This is especially true of west-bound cars, there being a down grade of three per cent. from Raymond avenue to Thirtieth street, the cross street next west of Malcolm avenue. The distance between the inside rails of the two tracks is 7 feet, but, as the cars project 22 inches over the rails, the clear space between two passing cars going in opposite directions would only be 4 feet 4 inches. The evidence shows that the width of the handle bars of a bicycle is from 22 to 24 inches. Hence a person riding on a bicycle in the space between the tracks would, under any circumstances, have to steer carefully to go safely between two passing cars. Moreover, as this space was neither prepared nor intended for a bicycle path, a rider would frequently have to deviate

from a straight line in order to avoid obstacles, and also to avoid the trolley poles which are set every 135 feet in the center of the space between the tracks; the distance between a trolley pole and a passing car being only 16½ inches.

From these facts the extreme danger of attempting to ride a bicycle in the space between the tracks must be perfectly apparent. We think that to do so under any ordinary circumstances ought to be held negligence as a matter of law. On the day in question the deceased started from near Raymond avenue to ride on his bicycle westward to Minneapolis. For no apparent reason, except that it was smoother than the remainder of the street, he undertook to ride between the tracks. When he had gotten part way down the grade a west-bound car reached the top of the hill near Raymond avenue. The motorman, of course, saw him. The evidence, in our judgment, is conclusive that the gong on the car was being rung as the car descended the grade. Some of plaintiff's own witnesses testify that they heard it when the car was still at least half a block distant from the deceased. He rode sometimes near the south rail of the north track, and sometimes near the north rail of the south track, apparently without the least effort by the use of any of his senses to ascertain whether a car was approaching him from behind, until he reached a point near the westerly intersection of University and Malcolm avenues, when, the west-bound car being already within 10 to 20 feet of him, he suddenly turned to the right to cross the northerly track, right in front of the approaching car; and upon getting upon the track he was instantly struck by the car and killed.

In our judgment, the evidence is conclusive that the deceased was guilty of contributory negligence so gross as to amount to extreme recklessness. Therefore the only question remaining is whether there was any evidence to go to the jury upon the question whether the motorman, after he saw the deceased in a place of danger, was guilty of wanton or wilful negligence in failing to exercise reasonable care to avoid injuring him.

In support of the affirmative of this question, counsel for the plaintiff claim that there was evidence that the deceased, up to the time he attempted to cross the north track, rode continuously

near the south rail of the north track, and hence was in a place of danger all the time, and that the fact that he never looked back, or gave any indication that he heard the gong or knew that the car was approaching, ought to have advised the motorman that he did not hear the signal, and was ignorant of the approach of the car. If the fact was, as claimed, that the deceased continuously rode near the south rail, we do not think this would have justified a finding that the motorman was guilty of any wanton or wilful negligence.

The car was in plain sight of the deceased, if he had looked in that direction. He had been warned of its approach by the sounding of the gong. There was no reason for the motorman to suppose that he had not heard it. The fact that he gave no visible indication of having heard the gong, or of being aware of the approach of the car, is of very little weight. Any one accustomed to ride on street cars, who is at all observant, must know that there is a very large number of bicyclers who ride between or near street-railway tracks, and who seem to think it is not "good form" to get out of the way of an approaching car, or to give any indication of their being aware of its approach, until the very last moment. If a motorman was required to stop or slow up in every such case until he was sure that the rider would get out of the way, it would be practically impossible to operate the cars so as to properly serve the public. Moreover, the deceased was riding a swift and noiseless vehicle, which was susceptible, by a mere pressure of the hand, of being turned aside in less time and with greater rapidity than a pedestrian could step aside. Under such circumstances, the motorman had a right to assume that the deceased could and would take care of himself.

But we think the evidence is conclusive that, when the deceased reached a point near the east crossing of University and Malcolm avenues, he changed his course, and rode near the north rail of the south track until he suddenly turned to cross the north track in front of the car; thus leading the motorman, as he testifies, to suppose that he was giving him "the right of way." The only evidence relied on to rebut this is the testimony of two witnesses, also riding bicycles, who passed the deceased near trolley post A,

about 40 feet east of the easterly intersection of University and Malcolm avenues, and who testified that after they passed the deceased they turned their heads and looked back at him, and that he was still riding near the south rail of the north track. But this is not inconsistent with the testimony of the motorman, and those who corroborated him, that the deceased afterwards, and before attempting to cross the north track, was riding near the north rail of the south track. It is perfectly clear from the evidence that the car was so close to the deceased when he attempted to cross the track that no possible effort thereafter on the part of the motorman would have avoided the collision.

Order affirmed.

NATIONAL FIRE INSURANCE COMPANY OF HARTFORD v.
BENJAMIN BROADBENT and Others.

June 29, 1899.

Nos. 11,608—(193).

Foreclosure of Mortgage—Receiver.

A receiver may be appointed in a real-estate foreclosure proceeding by action after foreclosure sale, and during the period for redemption, for the purpose of collecting rents and profits to protect and preserve the mortgage security, and to protect the mortgaged property from waste, but not to apply such rents and profits to the payment of any deficiency remaining after such sale. *Held*, however, that it conclusively appears that the facts in this case are insufficient to authorize the appointment of a receiver by the trial court, and it ruled correctly in denying the application for the appointment of a receiver, although it gave a wrong reason for so doing.

Appeal by plaintiff from an order of the district court for Ramsey county, Bunn, J., denying its application for appointment of a receiver. Affirmed.

H. L. Moss, Daniel W. Doty and William G. White, for appellant.
Warner, Richardson & Lawrence, for respondents.

BUCK, J.

This action was brought by the plaintiff to foreclose a mortgage

upon real estate, dated August 5, 1891, given by the defendant Broadbent to plaintiff. After the giving of the mortgage, the defendant Averill purchased the property of the owner, but did not in any manner become responsible for the payment of the mortgage debt. The defendant Mayhew is a tenant under Averill, and in possession of the premises. The action was commenced about May 7, 1897, to foreclose the mortgage and for the appointment of a receiver. Averill answered, and, among other things, denied plaintiff's right to have a receiver appointed. The cause was heard November 20, 1897, and judgment upon the decree entered May 20, 1898, and the premises sold July 5, 1898, for the sum of \$4,250, and on the same day a deficiency judgment was entered in favor of the plaintiff and against the defendant Broadbent for a balance due on said mortgage amounting to \$997.68. In the original decree there was included in it and in the judgment entered thereon delinquent taxes due for the year 1895, and \$55 paid by plaintiff for insurance, and a small sum of \$2.38 for assessment for sprinkling street at that time.

After the sale of the premises under the judgment, on November 30, 1898, plaintiff, upon affidavits, made an application to the court for the appointment of a receiver upon several grounds. Prior to this application the court had refused on several occasions to appoint a receiver upon the grounds that he had no authority to do so upon the facts stated. It again sought the appointment of a receiver upon the grounds that the mortgagors were insolvent; that the premises were inadequate security for the payment of plaintiff's debt; and

"That since the making and filing of the findings of fact and conclusions of law in this action on May 11, 1898, a new sidewalk has been laid in front of said property by the city of St. Paul, for which it will be assessed, and said property has been assessed for sprinkling the street in front of it in the year 1898; that since the trial of this action the defendant Helen W. Averill has not paid any of the liens for taxes and assessments and insurance upon said property, and does not intend to pay any of the same; that the taxes assessed against said property for the year 1896 amount to \$50.42, and for 1897 to \$46.42, upon each of which has accrued the penalties, interest, and costs provided by law, and said taxes are due, delinquent, and unpaid; that since May 1, 1898, some trifling

repairs, absolutely necessary to hold a tenant in said property, have been made, the exact amount of which is to affiant unknown, but he alleges upon information and belief that said repairs did not cost exceeding \$50; that other repairs, especially painting, are needed to preserve said property from decay."

These grounds are stated in the exact language of the counsel for plaintiff. It is further stated that the defendant Averill does not intend to redeem said premises from said foreclosure sale, but that she is receiving a rental of \$30 per month therefrom, and applying the same to her own personal use. Plaintiff's object in seeking the appointment of a receiver was that he might collect the rents of the premises during the year for redemption and apply them to the purposes above set forth.

As to the matter of the insolvency of the mortgagor and the inadequate security, this court, in the recent case of *Marshall & Ilsley Bank v. Cady*, 76 Minn. 112, said that

"The fact that the premises are inadequate security, or that the mortgagor is insolvent, or both combined, is, of itself alone, no ground for the appointment of a receiver, although it might be a very material consideration in passing upon the propriety or necessity of appointing a receiver for the purpose of preserving the premises."

Of course, under the rule also laid down in the foregoing cited case, the rents and profits could only be used for the purpose of protecting and preserving the property, and not for the purpose of paying the secured debt, or any part thereof. Now, the appointment of a receiver is an extraordinary remedy, frequently operating harshly, and the circumstances which invoke this remedy should be established with reasonable certainty. Ordinarily it is not a matter of right, and the facts upon which the application is based should be clearly stated and proven, especially in mortgage cases, where there is imminent danger of waste, removal, or destruction of the property. In other words, the appointment of a receiver

"Is to be exercised in conformity to the general principles of equity jurisprudence. The petitioner should, therefore, state clearly the facts upon which the application is made, and also give proof of the same; if this is not done the relief will be denied, and the bur-

den of proof is always on the petitioner." Beach, Rec. (2d Ed.) 524.

The grounds stated in the application for the appointment of a receiver, outside of those of insolvency and inadequacy of security, fall far short of the rules just stated. We need not consider the question of nonpayment of the insurance money, because it clearly appears that while the mortgagor covenanted in the mortgage to pay it, yet it is therein expressly provided that, if he did not do so, it might be paid by the mortgagee, and thereby become an additional lien upon the premises. This was done, and the amount therein paid by the mortgagee was included in the decree and judgment for which the premises were sold. The taxes assessed against the property for the year 1896 and 1897, and unpaid, were due and delinquent when the sale of the premises was made, July 5, 1898, and were then a lien upon the land, and the purchaser took the land subject to these incumbrances. *Marshall & I. Bank v. Cady*, supra. It does not appear when the new sidewalk was laid, except that it was done since May 11, 1898; nor when the sprinkling of the street was done, or the assessment made therefor,—whether before or after the sale,—nor is the cost or reasonable expense thereof stated in either case; nor is the amount of "some trifling repairs" stated, and the same may be said of the alleged and necessary expense of painting.

The insufficiency of the petition in not showing sufficient facts to justify the appointment of a receiver is too apparent to need further discussion, and the trial court was fully justified in denying the application. It is true, it did so upon the wrong grounds, viz. that after the foreclosure sale the court would have no power to appoint a receiver in the action for the foreclosure of the mortgage, as the mortgage was *functus officio*. We have no doubt that a mortgagee purchasing the property at a foreclosure sale, or a third party purchasing it, may, after the time of sale, and during the time for redemption, appear in the action, and apply for the appointment of a receiver to protect and preserve the mortgage security and prevent waste, and for this purpose may collect rents and profits, but for such purpose only. See *Marshall & I. Bank v.*

Cady, *supra*. The mere fact that the trial court refused to appoint a receiver for a wrong reason or upon erroneous grounds would not constitute reversible error when in fact and in law the ruling was correct.

Order affirmed.

HANNAH CURRIE v. LUTHER MENDENHALL.

June 29, 1899.

Nos. 11,643—(149).

Personal Injury—Street Car—Negligence.

Plaintiff, a street-car passenger, signaled for the car to stop so that she might alight, and as it commenced slowing up she went upon the lowest step of the car, and stood there for a moment, while the car was slowly moving, holding on to the car rail to steady and protect her from falling, when the car, before stopping, started forward with a jerk, and threw her to the ground, whereby she sustained personal injuries. *Held*, that the defendant's negligence and the plaintiff's contributory negligence were questions for the jury. *Salko v. St. Paul City Ry. Co.*, 67 Minn. 8, distinguished.

Action in the municipal court of Duluth against defendant as receiver of the Duluth Street Railway Company to recover \$500 damages for personal injuries. The case was tried before Edson, J., and a jury, which rendered a verdict in favor of plaintiff for \$333; and from a judgment entered pursuant to the verdict, defendant appealed. Affirmed.

Thomas S. Wood, for appellant.

Jno. Jenswold, Jr., for respondent.

BUCK, J.¹

The plaintiff claims to have sustained personal injuries by reason of the negligence of the defendant in operating its car while plaintiff was a passenger thereon.

In her complaint she alleges that she paid her car fare, and notified the conductor to let her off at Forty-Fifth avenue, but that

¹ MITCHELL, J., absent.

said defendant carelessly and negligently failed to stop the car at said avenue, but carried plaintiff by the same to Forty-Fourth avenue west, at which place the conductor slowed up said car, and was in the act of stopping the same for the purpose of letting her off thereat, when plaintiff left her seat, and proceeded to the rear platform of said car, to there step off upon the stopping of said car; and that while plaintiff, as aforesaid, was upon the said platform, the defendant did wilfully, and in a grossly careless and negligent manner, fail and refuse to stop said car, and he did in like manner fail and refuse to give her any assistance, or sufficient time to alight from said car, and he did in like manner suddenly start the same and increase its speed with such a jerk that plaintiff was thereby thrown off from said platform, and caused to fall, and strike her head, shoulder, and hip upon the street, and in so falling to sustain the injuries therein complained of. She also alleges in her complaint that, as the direct result of said fall, she was greatly injured, and damaged in the sum of \$500. On trial the jury awarded her \$333 damages. Upon a settled case the defendant moved for judgment in its favor notwithstanding the verdict, and that, if said motion was not granted, then that it be granted a new trial. The court denied the motion, and defendant appeals.

Plaintiff testified that after she entered the car she handed the conductor her fare, and told him that she wanted to get off at Forty-Fifth avenue, and that the conductor repeated after her the word "Forty-Fifth," and proceeded to take up the fares, starting from the front end of the car; that the car was full of people talking and laughing; that the car did not stop at Forty-Fifth avenue as requested, but carried her past her home; that thereupon she motioned to the conductor with her hand, in the usual way, to stop; that the conductor looked right at her, and rang the bell to stop the car at the next block, when the car began to slow up; that thereupon she arose from her seat, two seats from the rear door, went to the door, got down on the steps, and, with her right hand holding to the rail on the side, waited a moment, thinking the car would stop still, when all at once the car jerked away, and knocked her on the street, whereby she was seriously injured. She further testified that when she stood upon the platform step the car was barely

moving, and she thought it was going to stop still. Against this testimony is that of several witnesses, who directly contradicted her as to the ringing of the bell, the speed of the car, and the manner in which she left the car; they testifying that she walked right off the car into the street while the car was going at the rate of seven or eight miles an hour.

The weight of the testimony was on the side of the defendant, but there was nothing unreasonable in the testimony of the plaintiff, or that rendered it inherently improbable, and we are of the opinion that the case is one for, and was properly submitted to, the consideration and determination of the jury, unless upon her own uncorroborated testimony it conclusively appears that she was guilty of such contributory negligence as bars her from maintaining this action. Assuming that her own testimony was true, as the jury by its verdict found in her favor, was it negligence per se for her, after the conductor had, at her request, rung the bell for the car to stop for her to get off, to go and stand for a moment upon the step of the rear platform, with her right hand holding to the rail of a slowly-moving street car, when she believed, and had good reason to believe, that the car was about to stop for her to get off, and especially as she had previously notified the conductor that she wished to get off at Forty-Fifth avenue?

There is no question raised as to any injury or act of negligence while she was going from her seat to the step upon the platform while the car was slowing up. The negligence claimed by plaintiff is that, after she had proceeded to the platform, and descended to the lowest step, and while standing there for a moment, waiting for the car to stop, it was suddenly jerked by the negligent act of the defendant's servant in charge of the car, whereby she was thrown to the ground, and seriously injured. We must keep in mind the fact that she had made known to the conductor her destination, and had given a signal for the car to stop, and that after he had rung the bell for it to do so, and it was slowing up, she proceeded to this step, and waited there for a moment for it to stop. The ringing of the bell and slowing up of the car were notice that the car would stop, and that she would have time enough thereafter to get off the car. Up to the time when she stepped upon

the lower step, it cannot be said that either party was lacking in due care. But the conductor had authority to accelerate or slacken its speed, or stop its running at all, and it was his conduct that came to plaintiff to influence or induce her to go to the car step, where she was standing, expecting the car to stop, when the defendant's negligent act in suddenly starting the car caused the injury. It was the controlling circumstances in the case that made it one peculiarly within the province of the jury to say whether there was a failure on the part of plaintiff to exercise ordinary care and prudence in what she did.

Conductors of street cars are presumed to be experienced men in their occupation, and of practical judgment in operating their cars, and passengers are frequently influenced by their acts in getting off the cars. How far she was influenced in leaving her seat by the acts and manner of the conductor while the car was slowing up, and going to the step, and standing there a moment for the car to stop, is not, it seems to us, to be determined by this court as matter of law, but a question of fact for the jury. Not only was she standing in the place where a jury would have a right to assume she went by the conduct of the conductor, but she was holding on to the rail, preparatory to alighting when the car should stop; and she had a right to assume that the movement of the car would be the ordinary one, viz. that when a passenger was invited or authorized to alight, and the car was slowing up for her to do so, it would not start with a sudden jerk. She testified that she was not injured while alighting or attempting to get off from the car while it was in motion, but that, being in a delicate condition, and therefore in no condition to jump off, she waited a moment for the car to come to a standstill, fearing that she might get injured. The reasonableness of this statement is apparent, and suggests prudence, if not more than ordinary care, upon her part; certainly not foolish rashness or negligence.

Respondent's counsel earnestly contends this case comes within the rule laid down in, and is controlled by that of, *Saiko v. St. Paul City Ry. Co.*, 67 Minn. 8, 69 N. W. 473, and that under that decision the plaintiff herein cannot recover. This case differs from the *Saiko* case in one important respect. *Saiko* did not take hold of

the railing when he went upon the step of the car. It is stated in the opinion in that case:

"Nowhere does it appear that he made the slightest effort to steady or protect himself from any jerk or movement of the car by taking hold of the rails or any part of the car."

Ordinarily, and usually, a street car jerks to some extent in stopping and starting. It is the duty of a passenger to know this, and act accordingly, for the purpose of protecting himself from such a jerk at such a time; and, if he fails to take any reasonable precaution for that purpose, he is guilty of contributory negligence as a question of law. If he does take such precaution, and is thrown off by an extraordinary jerk, his contributory negligence is a question for the jury. Saiko made no effort to steady or protect himself. Plaintiff did so by holding on to the car rail for protection. In this case there was apparently but little, if any, danger to plaintiff in standing still for a moment on the steps of a slowly-moving car, protecting herself by holding on to the car rail while confidently believing the car would stop in a moment, and having the right to believe and assume that the movement of the car would be the ordinary one of safety and prudence, and not a sudden jerking of the car, whereby she was seriously injured. At least it was not error for the trial court to submit the question of her contributory negligence to the jury.

The weight of authorities seems to be greatly on the side of the proposition that a case of this kind should be submitted to a jury upon the question of contributory negligence on the part of the plaintiff. It is the duty of those in charge of a car to give passengers an opportunity to alight in safety, and a high degree of care in affording passengers an opportunity to do so is required. It was the duty of the defendant to stop the car, and not to start it, until the plaintiff had an opportunity to alight, and had alighted. And especially was it the duty of the defendant not to give the car a jerking movement after giving plaintiff an invitation to alight by ringing the bell, and slowing up the car, and while she was standing upon the car step, waiting to alight. While the weight of evidence was apparently on the side of defendant, yet there was a con-

flict of evidence as to the position of plaintiff, her acts in standing upon the platform and getting off; but we cannot hold that the evidence conclusively showed as a matter of law that plaintiff was guilty of contributory negligence. In the case of *Watkins v. Birmingham*, 120 Ala. 147, 24 South. 392, it was held that,

"Where a passenger notified the conductor where he wanted to alight, and, on approaching it, the train began to slow up, the question whether he was negligent by going on the platform steps preparatory to alighting, while the train was still in motion, was for the jury."

The facts in that case were analogous to those in this case. At the time he paid his fare he told the conductor that he desired to get off at Twenty-Fourth street, and when the train was between Twenty-Fifth and Twenty-Fourth streets he left his seat in the rear car, went to the back platform as the train slowed up for the west crossing, which was the proper side of the street on which to stop, and, after the engine and front car had passed over it at a speed of about three miles an hour, he got on the lower step, preparatory to stepping off, when the speed of the train was suddenly increased, or, as he testified, the car was jerked forward, and he fell to the ground, and received personal injuries. He was at the time holding on to the rear guard of the car with his right hand. Numerous authorities are cited in the opinion to sustain the law laid down in that case.

In *Bowie v. Greenville*, 69 Miss. 196, 10 South. 574, a passenger upon a street-railway car requested the car to stop, and, in the confident belief that it would, he got upon the lower step of the rear platform to be in a position to alight, when he was, by the negligence of the driver, thrown from the car, and injured; and it was held not demurrable as showing contributory negligence.

The case of *Harmon v. Washington & Georgetown R. Co.*, 7 Mackey, 255, was another case analogous to the one under consideration, and the court gave this instruction:

"If the jury believe from the evidence that the conductor, at the request of the plaintiff, rang the bell to stop the car for him to get off, and that the car thereupon slowed, and the plaintiff went out on the platform, and, while the car was moving very slowly, stepped

down on the step of the car, to be in readiness to step off when the car should fully stop, and that, instead of stopping fully, the car moved suddenly forward, in consequence of the negligent act of the conductor or driver, and he was thereby thrown off and injured, it would be for the jury to say, under all the facts and circumstances of the case shown in evidence, whether the conduct of the plaintiff caused or contributed to his injury; and, if they further believe that the plaintiff did, under the circumstances, what an ordinarily prudent man would have done, then he was not guilty of contributory negligence, and would be entitled to recover."

A verdict was rendered for the plaintiff, and upon appeal to the United States supreme court the rule asserted in the instruction was affirmed. *Washington & Georgetown R. Co. v. Harmon*, 147 U. S. 571, 13 Sup. Ct. 557. The opinion was written by Chief Justice Fuller, and in referring to certain instructions in the case he says:

"The duty resting upon the defendant was to deliver its passenger, and that involved the duty of observing whether he had actually alighted before the car was started again. If the conductor failed to attend to that duty, and did not give the passenger time enough to get off before the car started, it was necessarily this neglect of duty that did the mischief. It was not a duty due to a person solely because he was in danger of being hurt, but a duty owed to a person whom the defendant had undertaken to deliver, and who was entitled to be delivered safely by being allowed to alight without danger. Viewed in this light, the instruction was unobjectionable. If the conductor negligently failed to observe whether plaintiff had alighted, or knowing that he had not, negligently started the car too soon, and in consequence of that, a sudden jerk of the car took place and threw him down and was the immediate cause of his falling, and the accident would not have happened but for that fact, we think it clear that such negligence as might be imputed to the plaintiff in being upon the step at all, could not, under the circumstances supposed, be properly held to have been contributory negligence. To hold so would be to determine that a carrier could defend his own negligence in the particulars named upon the ground that if the plaintiff had not been there he would not have been hurt. It may be said that he placed himself where he was in risk of falling off, but that was a risk he could not have anticipated as the result of a sudden start before he had got off, because he had a right to assume that the car would actually stop to allow him to get off, and if it had, as it should have done, upon the hypothesis of the instruction, no accident would have happened. Under the terms of the instruction the injury en-

sued directly from the defendant's negligence, and that was its proximate cause."

The vital questions of fact in this case were controverted upon the trial, and submitted to the jury, and it found in favor of the plaintiff.

We find no errors in the record, and the denial of defendant's motion for a new trial is affirmed.

SELSEY BROS. COMPANY v. MINNEAPOLIS COLD-STORAGE
COMPANY.

June 29, 1899.

Nos. 11,657—(212).

Factor—Negligence—Findings Sustained by Evidence.

Evidence considered, and *held* sufficient to sustain the findings of the trial court.

Practice—Amendment of Record—Stipulation.

Certain matters of practice considered and disposed of.

Action in the district court for Hennepin county to recover \$879.15 damages for defendant's negligence in handling a consignment of lemons and onions. The case was tried before Johnson, J., and a jury, which rendered a verdict in favor of plaintiff for \$778; and from an order, Brooks, J., denying a motion for a new trial, defendant appealed. Affirmed.

Merrick & Merrick, for appellant.

Taylor & Edwards, for respondent.

BUCK, J.¹

Two causes of action are set forth in the complaint, but when the case was called for trial the defendant moved the court that it compel the plaintiff to elect upon which cause it would proceed. The motion was granted, and plaintiff elected to stand upon the second cause of action.

¹ MITCHELL, J., absent.

The principal question involved is whether the findings of the trial court are justified by the evidence.

The findings of fact, briefly stated, are that each party is a corporation, and in 1896 the plaintiff was engaged in business in the city of Philadelphia, in the state of Pennsylvania, as a wholesale dealer in fruit, and in the same year the defendant was, in the city of Minneapolis, in this state, engaged in the business of handling and dealing in fruit as a broker or commission merchant, and during the same time owned and there operated and carried on a cold-storage plant, with John W. Stevens as general manager; and in said year the defendant, through said manager, solicited of plaintiff the shipment and consignments of fruits, including lemons, to it, as broker or commission merchant, representing to plaintiff that, from its experience in the handling of lemons and fruits, it had superior knowledge of such business, and had superior advantages in caring for and selling such merchandise (also including onions), and was able to and would handle and sell at a profit to plaintiff any such shipments; and, induced thereby, the plaintiff did in the months of May and June, 1896, ship and consign to defendant a certain number of boxes of lemons and sacks of Egyptian onions, which were duly received by defendant at Minneapolis, not for storage, but for sale, on their arrival or promptly thereafter, pursuant to an express agreement, and that such as were not so sold were to be kept in good salable and merchantable condition, in cold storage, for which defendant should have and receive as compensation a brokerage or commission of 10 per cent. upon sales thereof, and 8 cents per box per month for storage of the lemons,—cold storage not being necessary or desirable, of which fact defendant had due knowledge.

The defendant did not sell a large amount of said lemons and onions on arrival, nor as promptly as it had agreed to do, and did not use due and proper diligence in attempting to do so, but unreasonably delayed selling them, and carelessly and negligently cared for and handled the same, contrary to this agreement and to plaintiff's instructions, whereby the lemons deteriorated in value, and became unsalable and unmerchantable and worthless, and the onions became of no value, without the fault of the plaintiff, to its

damage in the sum of \$778, with interest, for which judgment was entered accordingly. Defendant appeals.

There are some 78 exhibits found in the settled case,—mostly letters relating to the business between the parties and the manner in which it was being conducted, and out of which grew the agreement between the parties, and upon which the trial court found the defendant liable. While we have carefully examined the oral evidence and exhibits, we decline to enter into an analytical examination and place the same in this opinion, as we deem it unnecessary. We deem it sufficient to say that in our opinion the evidence supports the trial court's findings of fact, and the findings of fact sustain the conclusions of law.

The witness Stevens, who was the general manager for the defendant, testified as follows:

"I wrote to the different town buyers, quoting them prices, and offered them to the wholesale fruit houses, and tried to get them to come over and buy them; * * * offered to give them long time, and take their acceptance, payable in 60 days."

The plaintiff moved to strike out this evidence. The motion was granted, and defendant excepted. This evidence was undoubtedly competent, as having a direct bearing upon the conduct of the defendant in its effort to comply with its contract in selling the fruit as promptly as possible; but, subsequent to the trial, the parties, by written stipulation, struck out from the record all of said evidence, the objection, and the exception, and inserted instead thereof the following:

"Q. What effort did you make, Mr. Stevens, to sell the last three car loads of lemons? (Objection as immaterial,—been over it on cross-examination,—and exception by plaintiff.) A. I made every effort possible to sell them, from the time they came in until they were so poor that we could not sell them at all. (Plaintiff moves to strike out the answer of the witness, as indefinite and as stating his opinion.) The Court: I think it is a conclusion. Q. What do you mean by 'every effort possible'? A. I wrote to different town buyers, quoting them prices, and offered them to the wholesale fruit houses, and tried to get them to answer and buy them. Telephoned them, and offered to give long time, and take their acceptance, payable in 30 to 60 days, and made every inducement that I possibly could to get the people to buy. (Plaintiff moves to strike that out.

Granted, so far as his stating he made every inducement possible. Plaintiff moves to strike out the witness' entire answer on the ground that no notice of this motion was ever received by plaintiff. Denied. Exception by plaintiff. Plaintiff then moved to strike out the statement of witness that he quoted prices and offered terms. Motion granted.) Mr. Merrick: He says that he wrote to outside parties. You strike that out? The Court: Yes."

Conceding that the evidence, or part of it, stricken out, was competent, yet it does not appear that there was any exception to this ruling. The stipulation provided that the record so amended should stand, and be and may be read, used, and considered at the hearing in this court the same as if same had been so returned and so printed in the first instance; the failure in this respect being purely inadvertent, such amendment being the minutes of the court reporter of the trial. While the parties had no strict legal right to amend the record, and we do not approve of such practice, yet we think that the appellant's attorney by his conduct waived his right to insist upon the original exception, and he must abide the consequences of the stipulation, and the omission therefrom of the exception.

No error appearing in the record, the order denying defendant's motion for a new trial is affirmed.

NOAH SWENSON v. CHARLES ERLANDSON and Others.

June 29, 1899.

Nos. 11,664—(224).

New Trial—Hicks v. Stone Followed.

Hicks v. Stone, 13 Minn. 398 (434), followed, and order granting a new trial affirmed.

Appeal from an order of the district court for Lac qui Parle county, Qvale, J., granting a motion for a new trial. Affirmed.

K. O. Jerde and A. J. Volstead, for appellant.

Palmer & McElligott and E. T. Young, for respondents.

BUCK, J.

Action to recover damages of defendants for their negligence in setting fire to the barn and personal property of the plaintiff, whereby such property was destroyed. On the trial the plaintiff had a verdict, and upon a settled case the trial court granted a new trial. Even though there was some evidence reasonably tending to support the verdict, yet there was not such a manifest and palpable preponderance thereof as to warrant this court in overruling the order granting a new trial, and the case of *Hicks v. Stone*, 13 Minn. 398 (434), and numerous subsequent cases in this court to the same effect, control this one.

Order affirmed.

STATE v. J. A. WILLARD.

June 30, 1899.

Nos. 11,524—(18).

Taxes—Listing Credit Held by Resident Trustee.

Under the provisions of G. S. 1894, § 1515, subd. 6, and section 1516, a credit which is held in trust by a resident of this state is to be listed for taxation by such resident, as trustee, in the taxing district in which he resides, and the amount thereof is to be assessed in such district.

Same—Situs for Taxation.

The situs of such property for taxation cannot be changed from the county in which the trustee resides to another, simply because he omits to list the same in accordance with the statutory provisions.

Unlisted Certificate of Deposit—Place of Listing—Application to State Auditor.

In the case at bar, the credit was in the form of a certificate of deposit made payable to one W., as trustee for the stockholders of a state bank, and payable in four annual instalments without interest. By agreement it was left in the vault of the bank, which was located in Yellow Medicine county. W. resided in Blue Earth county. He did not list the credit for taxation in either county. The auditor of the first-mentioned county placed the item on the assessment rolls for taxation as the property of W., as trustee. W. made no effort to have the place of listing this credit fixed and determined by the state auditor, under the provisions of G. S.

1894, § 1522. He did attempt to have the taxes abated, as provided for in section 1652; but the county board and county auditor, to whom he applied, refused to recommend his application. *Held*, that it was incumbent upon W. to promptly apply to the state auditor for a determination of the question in dispute as to the proper place for listing and assessing this item, and that he could not raise the question by answer to a citation issued to him after the sheriff had returned the tax assessed against him as uncollectible.

Trustee Real Owner—Deduction for Personal Debts—Waiver.

W. was the actual owner of more than one-third of the stock of the bank, and therefore the owner of more than one-third of this credit. His bona fide indebtedness at the time largely exceeded the amount of this credit, and he had made no claim for deduction to the assessor at his place of residence or elsewhere. He failed to claim any deduction from his share of this credit, on account of this indebtedness, until he attempted to have his application for an abatement and correction to the state auditor favorably recommended by the county board and county auditor, as before stated. He offered no excuse or justification for the apparent delay in claiming the deduction. *Held*, that he had waived his right to a deduction on account of indebtedness, and was not entitled to assert the claim when answering the citation.

In proceedings in the district court for Yellow Medicine county to enforce collection of delinquent personal property taxes, defendant interposed an answer. The case was tried before Qvale, J., who found that plaintiff was entitled to judgment against "defendant trustee" for \$1,197, and on application of defendant certified to the supreme court for its determination the points referred to in the opinion, together with copies of the citation and of defendant's answer, a statement of the facts, and the decision and order for judgment. By the statement of facts it appeared that defendant did not list for taxation the item of \$45,000, which was in dispute, nor was it assessed in Blue Earth county for 1893; that on May 1, 1893, defendant was indebted in the sum of \$100,000; that for many years before and immediately after May 1, 1893, defendant prepared no statement of indebtedness to be deducted from his credits in listing his property for taxation, because during all that time his indebtedness exceeded all such credits; that said \$45,000 was wholly omitted from taxation during the year 1893; that the county auditor of Yellow Medicine county on February 13, 1896, assessed said item of

\$45,000 at the cash value of \$35,000, as property omitted from taxation for the year 1893, and the tax so levied amounted to \$1,197, exclusive of interest; that defendant after the assessment and levy thereon made due application to the state auditor, and presented the same to the board of county commissioners and the auditor of Yellow Medicine county for their favorable recommendation to the state auditor for an abatement and correction, and that said board and county auditor refused and declined to recommend favorably such abatement or correction. The other facts are stated in the opinion. Affirmed.

L. H. Schellbach and Lorin Cray, for defendant.

Trust funds should be listed by the trustee, but assessed to the owner, or to the trustee as such. *Farmers v. Hoffmann*, 93 Iowa, 119; *State v. Rand*, 39 Minn. 502. If the citation is made to defendant personally, he should be allowed his statutory deductions; and if made to him in a representative capacity, he should be allowed his deductions, at least to the extent of his own individual interest in the trust fund, because he cannot be a trustee for himself. Defendant prepared no statements of such indebtedness because his indebtedness exceeded his credits, and in the present case he had no opportunity to do so. *Ruggles v. City*, 53 Wis. 436; *State v. Rand*, supra; *State v. Moffett*, 64 Minn. 292. Credits should be assessed in the county where the owner resides. *State v. Rand*, supra; *Trustees v. City*, 90 Ga. 634. An assessment made elsewhere than at the legal situs of the property as fixed by statute is void. *Barber v. Farr*, 54 Iowa, 57; *Babcock v. Township*, 65 Iowa, 110; *Remey v. Board*, 80 Iowa, 470.

W. B. Douglas, Attorney General, *A. J. Volstead*, County Attorney, and *C. A. Fosnes*, for the state.

The judgment rendered in pursuance of the order of judgment would not be personal. Notwithstanding *State v. Moffett*, 64 Minn. 292, we urge the point that G. S. 1894, § 1526, allowing deduction of indebtedness from credits, is unconstitutional. In re Assessment, 4 S. D. 6. But even if the statute is valid, in no event could defendant make deduction except for debts owing by him as trustee, and he did not claim that such debts existed. Defendant was a trustee.

27 Am. & Eng. Enc. 3. Property held in trust is taxable to the trustee. 25 Am. & Eng. Enc. 124; Black, Tax Tit. § 106; *Richardson v. City*, 148 Mass. 508; *People v. Board*, 40 N. Y. 154, 158; G. S. 1894, §§ 1515, 1523. A creditor may give his credits a business situs. In re *Jefferson*, 35 Minn. 215; *Catlin v. Hull*, 21 Vt. 152; *People v. Commrs.*, 23 N. Y. 224; *Finch v. County*, 19 Neb. 50. In case of doubt the situs may be fixed by the state auditor, and when so fixed his decision is binding. G. S. 1894, § 1522. The property having been omitted, it was the duty of the county auditor to enter it on the list for the three years omitted. G. S. 1894, § 1631. Such statutes are liberally construed. *State v. Baldwin*, 62 Minn. 518. Defendant cannot complain of want of notice. *State v. Deering & Co.*, 56 Minn. 24, 27; G. S. 1894, § 1569. The record does not show on what ground defendant sought abatement, nor that he had exhausted statutory remedies for abatement. *Clarke v. County of Stearns*, 47 Minn. 552. The action of the county auditor was not void, but at most voidable.

COLLINS, J.

Personal property tax case certified up as provided by statute.

The main facts are that the Granite Falls Bank, a duly incorporated state bank, located at Granite Falls, Yellow Medicine county, with a capital of \$50,000, had, prior to April 20, 1893, accumulated undivided profits in excess of \$45,000. On that day a dividend of \$45,000 was declared out of said profits, and it was directed that payment of this dividend, without interest, be made in four annual instalments, for which nonbearing interest certificates of deposit should be issued, the first to become due October 20, 1894. It was also voted that these certificates should be made payable to the president of the bank in trust for the stockholders according to their stock shares, and that they should be left by the trustee in the vault of the bank. Thereupon a single certificate of deposit was issued, made payable to defendant Willard, as trustee for the stockholders, and this certificate was then and there placed and left in the vault of the bank as agreed upon, and it was there when the tax proceedings were had. Willard was then the president of the bank, he was the owner of about one-third of its stock shares, and

he then, and for many years previously had, resided in Blue Earth county in this state. He did not list the certificates or the amount therein mentioned for taxation. Nor was it assessed for taxation in any way for the year 1893, except as was attempted in these proceedings.

At this time Willard was indebted in excess of all his credits in the sum of \$100,000, exclusive of the debit items which cannot be deducted, mentioned in G. S. 1894, § 1526, but he did not and never had prepared any statement of indebtedness that the amount might be deducted from the gross amount of his credits in tax proceedings. No question seems to be made over the regularity of the proceedings, in matters of mere form, through which this item of \$45,000 was placed on the rolls for taxation and thereafter assessed by the county auditor. After the levy, an attempt was made by Willard to submit the matter to the state auditor by first presenting a statement of the facts to the board of commissioners and county auditor, as provided in section 1652, and petitioning those officials for a favorable recommendation for an abatement of the tax. This petition was denied. The findings are silent as to whether Willard at any time attempted to have the state auditor fix and determine, as between the taxing district in Blue Earth county, in which he resided, and that in which these proceedings were had, the place of listing, or the situs of this personal property for assessment purposes, as he might have done under section 1522. With this condition of the findings the presumption is that he made no effort in that direction.

1. The first point to be disposed of among those certified up is that which raises the inquiry as to whether the credit represented by the certificate was assessable and taxable in Yellow Medicine county, when Willard's place of residence was in another county in this state. The court below held that it was.

On the facts here shown it must be held that Willard was the trustee of an express trust as to that part of the certificate which represented the interests of others. He was the legal owner of the entire credit, and the actual owner of more than one-third of it. The duty devolved upon him to list the entire credit, for as to that part held in trust the statute (section 1515, subd. 6)

required that he should list it as trustee. If, as his counsel claim, it was intended that trust property should be listed by the trustee in the name of the cestui que trust, and the assessment be so made, the statute would have been as explicit in this respect as it is in the same section (subdivision 2) when providing that personal property invested, loaned, or otherwise controlled by an agent or an attorney, or on account of another person, shall be listed in the name of the principal, and as explicit as it is in the tenth subdivision, where it is provided that the property of manufacturers and others in the hands of an agent shall be listed by him in the name of the principal. These definite provisions as to what classes of property are to be listed in the name of a principal, although in the hands of an agent, clearly indicate that counsel's claim as to personal property held by a trustee is not well founded. If, then, it was Willard's duty to list this credit, a part of which he owned absolutely and a part of which he held as trustee, the place of listing was at his place of residence in Blue Earth county, under section 1516, and it must follow that, if this was the place for listing, it was the place or county in which these proceedings should have been instituted.

Neglect on the part of Willard to list this credit in the taxing district in which he resided would not of itself confer jurisdiction upon the officers of another district in another county to assess and levy a tax upon it in the latter. The situs for assessment of personal property held in trust by a resident of this state cannot be changed from the county of his residence to another county, simply because he omits to list the same in accordance with the statutory provisions as to place of listing. The general rule is well settled that, in the absence of a statute to the contrary, the law looks upon a trustee as the owner of personal property, and the place of assessment for taxation at his domicile. 1 Perry, Trusts, § 331; Cooley, Taxn. 375; Burroughs, Taxn. 325; Latrobe v. Mayor, 19 Md. 13. See also Trustees v. City, 90 Ga. 634, 17 S. E. 61; People v. Board, 40 N. Y. 154; Trustees v. City, 12 Cush. 54; Lewis v. County, 60 Pa. St. 325. The proper taxing district for this credit was in Blue Earth county, and the question certified up in regard to this point is so answered.

But, on the facts in this case, it is not a sequence that the proceeding was wholly void. Willard did not list the credit in the county of his domicile, nor in the county in which the bank was located, and in which the certificate itself remained, under the agreement that it was to be left in the vault of such bank. It was not listed at all, and of course there was no return of the item by an assessor. This was discovered by the auditor of Yellow Medicine county, and, claiming that the property had acquired a situs in his county for the purposes of taxation, he proceeded in the manner prescribed in section 1551, and listed the same for such taxation. Of this proceeding Willard had notice after the levy, according to the findings, the exact time not being found, and thereupon he took the steps hereinbefore mentioned, under the provisions of section 1652. But it does not appear, as before stated, that he attempted to avail himself of the provisions of section 1522, under which he could have had the proper place of listing this credit decided and fixed by the state auditor.

This section expressly provides for a determination of all questions which may arise under the tax laws as to the proper place to list personal property, and, where the doubt or question arises as between different counties or places in different counties, the place is to be fixed by the state auditor, and, when so fixed, the auditor's decision is as binding as if fixed by the statute. There was a question in this proceeding as to the proper place of listing, which was raised by Willard himself when he attempted to obtain relief under section 1652, and this question should have been submitted by him to the state auditor promptly upon discovering that proceedings to assess had been initiated in Yellow Medicine county. Full authority has been conferred upon the auditor to determine finally the question in cases of doubt and dispute, and to him the application must be made. In *Clarke v. Board of Co. Commrs.*, 66 Minn. 304, 69 N. W. 25, it was held that an application to the state auditor to determine in which of two counties certain personal property should be assessed was of no avail to the owner, because made without notice to the interested local authorities. It is obvious that an owner of property who has wholly failed to apply to the auditor for his decision of the controversy as to the proper place

for listing cannot be in a better position when responding to a citation than is the owner who has applied *ex parte*. It was incumbent upon Willard to apply promptly to the state auditor for a determination of the doubtful question, and, having omitted so to do, he cannot now be heard upon his claim that the credit was assessed in the wrong district.

If there were any facts which would excuse his failure to submit this question to the statutory tribunal, such as lack of knowledge on his part that proceedings had been instituted in Yellow Medicine county until it was too late, it should have been made to appear in the trial court, and should have been covered by the findings. There are none in those now before us.

2. What has been said hereinbefore disposes of another point, namely, as to the order of the court that judgment be entered against "said defendant trustee" for the amount of the tax. This was correct, for, as before stated, Willard was the legal owner of the entire item of credit. As the legal owner and the proper person to list, he was the party against whom to proceed and against whom judgment should be ordered.

3. The last question arises out of the fact that Willard was indebted in an amount much larger than the amount of this credit, and, under the statute (section 1526), may have been entitled to deductions.

It is enacted by this section that, in making up the amount of credits which any person is required to list for himself or for another, he shall be entitled to deduct from the gross amount thereof the amount of all bona fide indebtedness of himself or of the other person, certain kinds of indebtedness being excluded by the terms of section 1527. The method for making the claim for deductions is set forth in the last-mentioned section. From the provisions found in these two sections it would seem that a claim for a deduction on account of indebtedness should be made when listing credits with the assessor, and cannot be made at any other time or in any other manner. If this is not a proper construction of these sections, the assessor has no opportunity to obtain the affidavit mentioned in section 1527, or to otherwise verify the bona fides of the claim. But, be this as it may, it does not appear from the

record that Willard made any claim for a deduction on account of his indebtedness, or in any manner made it known that he was in debt, and entitled to a deduction, until it was stated in his application to the state auditor for an abatement and correction of the tax in question, which application he presented to the board of county commissioners and to the county auditor for the sole purpose of having it favorably recommended, as required by law. Even if it is clear that he then made this particular claim, we are of the opinion that it was too late. No attempt has been made to justify or excuse an apparent failure to demand promptly that, when assessing his credits, his indebtedness be deducted, and for that reason Willard waived his right to a deduction as to that part of the item of credit which he actually owned.

In this connection it is not improper to state that there are authorities which hold that no deductions for indebtedness can be made under any circumstances, unless they are made in the exact manner and upon the production of the precise evidence required by statute. 25 Am. & Eng. Enc. 229, and cases cited in note 5. Whether this is the law in this jurisdiction we need not decide.

This disposes of the case, and it is remanded with the order that judgment be entered in accordance with the conclusions of law of the trial court.

CHARLES L. BENNETT v. E. W. BACKUS LUMBER COMPANY.

June 30, 1899.

Nos. 11,662—(202).

Personal Injury—Sawmill—Negligence—Excessive Damages.

In an action for personal injuries, *held*, that the verdict to the effect that the defendant was and the plaintiff was not guilty of negligence is sustained, but *held*, further (Start, C. J., dissenting), that the award of damages is excessive, and not sustained by the evidence.

Challenge for Actual Bias—Appeal.

Held, following *Perry v. Miller*, 61 Minn. 412, that, where the court acts as a trier of a challenge to a juror for actual bias, its decision cannot be reviewed on appeal.

G. S. 1894, § 5659—Cross-Examination of Superintendent.

G. S. 1894, § 5659, providing that certain officers or agents of a corporation may be called for cross-examination, construed, and *held*, that any officer, agent, or superintendent having the actual supervision or control of the work or act of the corporation involved in the case may be so called and examined, whether his rank be that of a general officer or not.

Action in the district court for Hennepin county to recover \$5,373 damages for personal injuries. The case was tried before McGee, J., and a jury, which rendered a verdict in favor of plaintiff for \$2,000; and from an order denying a motion for a new trial, defendant appealed. Affirmed on condition.

Koon, Whelan & Bennett, for appellant.

Geo. B. Leonard, R. B. Stalder and Stiles & Stiles, for respondent.

START, C. J.

The plaintiff was injured on September 13, 1898, while working for the defendant in its sawmill at Minneapolis, and brought this action for the damages sustained, on the ground of the defendant's negligence. The cause was tried January 26, 1899. Verdict for the plaintiff for \$2,000, and the defendant appealed from an order denying its motion for a new trial. The principal questions raised by the assignments of error relate to the sufficiency of the evidence to support the verdict as to the negligence of the defendant, the contributory negligence of the plaintiff, and the award of damages.

1. There is no controversy as to how the accident whereby the plaintiff was injured occurred, but as to the alleged negligence of the defendant in the premises the evidence is radically conflicting. There were in operation in the defendant's mill at the time three sets of rollers set in three wooden cases or tables standing end to end, so as to make, when operated at the same time, a continuous table and passageway about three and one-half feet high and three feet wide for lumber from the band saw at the north end of the mill to the outside of the mill on the south. The rollers were about three feet six inches apart, and each projected above the surface of the table about three-eighths of an inch. The first set of rollers was next to the band saw, and extended therefrom towards the south about 32 feet. The next set joined this, and extended still further south about 60 or 70 feet, and the third set extended thence

about 40 or 50 feet to the south end of the mill. These sets of rollers moved at different rates of speed, and were so adjusted that each set could be stopped without stopping the others. The set of rollers next the band saw was seldom stopped, while the others were stopped as occasion required to remove lumber, or cut it, or for other purposes.

A short time before the accident occurred, a log designated as a "snag," which had broken in the woods, came up from the river to the band saw, and was found to be too short to be sawed into lumber, and was sent along the rollers, and, when it reached a point on the second set of rollers about 14 to 16 feet from the end of such set furthest from the band saw, it fell upon the floor of the mill. After it fell off, the second set of rollers was stopped, and the superintendent of the mill called five or six men, among whom was the plaintiff, who were working in the vicinity, to assist in putting the snag back upon the rollers. This was done, and the snag was placed upon the second set of rollers at a point near the lower end thereof. The plaintiff had worked in and about sawmills in various capacities for many years, and was familiar with their operation, but had worked in this mill only some 12 days prior to the accident, and was not aware that there were more than two sets of rollers. He supposed that the first and second sets formed one section of the table. After the log had been replaced on the rollers, the plaintiff got upon the table and took hold of the end of the log towards the saw, with his back to the saw, for the purpose of holding the log on the table. This position was one of comparative safety if a set of rollers between him and the saw were kept stationary, but one of positive danger if all of the rollers back of him were kept running.

The plaintiff testified that he was directed by the superintendent of the mill, Mr. Flanagan, to assume the position he did; that he refused to do so, unless the rollers behind him were stopped and kept so while he was on the table; and that the superintendent told him that he would do so. The plaintiff further testified that, relying on the promise of the superintendent, he got upon the table near the junction of the second and third sets of rollers, and took hold of the log, and after it had gone over on to the third set, and

while he was guiding the log in a stooping position, with his back to the band saw, the rollers of the section behind him were started without his knowledge, but with the knowledge of Mr. Flanagan, and a 4x12 plank, 20 feet in length, came over the second section and upon the third, and struck him on his left foot at the ankle joint, driving the ankle and foot against the log. The plaintiff on his cross-examination, as to his conversation with the superintendent, testified as follows:

"Q. What were the words he used? A. He said, 'Get up there and hold that log.' I said, 'I won't do it until you stop those rollers, and keep them stopped.' Q. Which rollers? A. The live rollers from the band. Q. Do you mean the first set? A. Yes, sir. I said, 'This plank is coming down onto me,' after they had sawed it. Q. You said that you wouldn't do it. Were those the words that you used? A. Yes, sir. Q. Just tell me the words that you used to him. A. I told him that I wouldn't get up there until he stopped those rollers and kept them stopped, and he said he would, and he caused them to be stopped."

The superintendent testified that he did not direct the plaintiff to get upon the table and hold the log, and that no such conversation as claimed by him occurred, but that, on the contrary, he directed two of the men to get on each side of the roller case and steady the log, and that when he saw that the plaintiff was upon the roller case, holding the log, he told him to get down and stand by the side of it. He also testified that the first set of rollers was running while the log was being placed on the case, and were not stopped at any time until the plaintiff was hurt. The superintendent was corroborated more or less directly by other employees,—six in all,—who were working at or near the case at the time.

It is claimed by the defendant that the testimony of the plaintiff was so inherently improbable, and the verdict so manifestly against the great weight of the evidence, that it was an abuse of discretion on the part of the trial court not to grant a new trial. If the superintendent did, in fact, direct the plaintiff to get upon the table or roller case, and steady the log in that position, there would seem to be nothing unreasonable in the plaintiff's declining to do so, unless he had assurances that a set of rollers behind him were to remain stationary while he was executing the order; for, from his

experience as a workman in and about sawmills, he must have appreciated the danger of the position if all of the rollers back of him continued to run. It must, however, be admitted that it seems somewhat unreasonable to believe that the superintendent would give such an order, or that the conditional refusal of the plaintiff was couched in the formal and defiant language he claims to have used. On the other hand, it is difficult to understand why the plaintiff should have been so idiotic as to place himself in this position of danger on his own motion, without any assurance that the rollers behind him would be stopped, and remain there after being ordered away by the superintendent. He was an experienced man of mature years, and his conduct is inexplicable, except upon the hypothesis that he was ordered to the place, and complied on the assurance that he would be protected. But it is not our purpose to state in full or to discuss the evidence.

Our conclusion, based upon the whole record, is that the verdict, the question of damages aside, is not so manifestly and palpably against the weight of the evidence as to justify us in holding that the trial court abused its discretion in refusing to grant a new trial. Assuming, as the jury have found, that the plaintiff's version as to the order, promise, and action of the superintendent is correct, the defendant was guilty of negligence. There was no material variance between the negligence alleged in the complaint and that which the plaintiff's evidence tended to prove. The question of the plaintiff's alleged contributory negligence is inseparably connected with that of the defendant's negligence; for, if the plaintiff placed himself in the position he did by the direction of the superintendent, and in reliance upon his assurance of protection, he was not negligent, as a matter of law. We hold the verdict is sustained by the evidence as to the question of the plaintiff's contributory negligence and as to the defendant's negligence.

2. The defendant further claims that the damages are so excessive as to indicate that they were awarded as the result of prejudice.

The plaintiff's ankle was sprained as a result of the plank striking his ankle joint. A sprained ankle may or may not be a serious injury. In some cases the injury resulting from such a sprain is

more serious than a broken leg, while in others it is comparatively slight. The amount of damages which ought to be awarded for such an injury must depend upon the facts of each particular case. Thus, in the case of *Christian v. City of Minneapolis*, 69 Minn. 530, 72 N. W. 815, it was held that an award of \$3,000 damages was not excessive for a sprained ankle. But in that case the trial was had two years after the injury, and the plaintiff had not then recovered, and the fair probability was that she never would fully recover from the injury. That case is clearly distinguishable from this one.

The opinions expressed by the medical experts as to the extent of the plaintiff's injury and the probability of his complete recovery were conflicting. The surgeons called by the plaintiff expressed a more or less positive opinion that the ligaments and a nerve of the ankle were injured. One of them on his cross-examination testified as to the injury to the ligaments and nerve as follows:

"Q. I suppose then, doctor, that we may say that between October 25 and the time when you recently examined him that the thickening around that joint had disappeared? A. To a great extent. Inflammation subsided. The effusion was absorbed out of the joint. The effusion in the tendon was absorbed. Q. And that originally there were no fractures? A. Not on that foot as far as I could discover. Q. And what do you say about any tendons being broken? A. No tendons broken as far as I could discover. Q. Any ligaments? A. That is a question that I am not prepared to answer. If the effusion in that joint was caused by traumatism, which I have reason to infer that it was, I don't think there is any question but what the ligaments in the ankle joint had been injured. Q. But you would not care to say how much? A. I would not say how much; nobody can say. * * * Q. I understand you to say that you did not claim that that nerve inflammation existed now, but it had existed? A. It does not exist at the present time to a marked degree, but it has existed, and now we have simply the results of the inflammation of that nerve,—paralysis of the nerve and loss of sensation. * * * Q. Do you think that inflammation in this nerve was caused by this injury down there on the side of the foot? A. I do; probably indirectly; directly or indirectly. Q. Your opinion is that it was not in any way, except indirectly? A. I said probably indirectly, but it can be directly; but probably indirectly in this case,—the same thing."

Another of the plaintiff's experts expressed the positive opinion that the plaintiff was suffering at the time of the trial from neuritis

or inflammation of the nerve, caused by a blow, and that if it continued the leg would finally become useless; but whether it would continue or not he was not prepared to say, and that, in his judgment, it was a little problematical. The last surgeon called by the plaintiff gave it as his opinion that he was suffering from neuritis, and gave his opinion as to the probability of his recovery in these words:

"I would not state the probability. It is four and a half months since the accident. I know what the present condition is. From that present condition it must at least take a long time before it is restored. It may remain as bad as it is at present, or may grow worse."

The defendant called two surgeons. The first one testified that he examined the plaintiff's foot on the day of the accident, and found no external marks of injury, and that he made a further examination the latter part of October, and could find nothing wrong with the foot. The other surgeon, who examined the plaintiff at the time last stated, testified as follows:

"I looked the foot over carefully; also compared it with the other foot, and I was not able to make out any difference between the two feet. There was a slight difference between the size of the two legs; but, as has already been stated, that, in my opinion, was due to the bandaging. The foot had been bandaged, and I thought that its being smaller was due to the pressure of the bandage. Outside of that I couldn't notice any difference between the two feet. * * *

Q. Any evidence of broken bones? A. None whatever. Q. Any evidence of ruptured ligaments? A. None that I could see. Q. Any evidence of diseased nerves? A. I could not make out anything of the kind. He said nothing about pain which would be indicative of diseased nerves. * * * Q. Then, what did you find the trouble with his foot as far as you could see? A. I didn't see anything wrong with the foot at all."

If we turn from these conflicting opinions and speculations of the learned experts, and consider the admitted physical facts of the case from the standpoint of common sense, it is reasonably clear that the plaintiff's injury is not permanent, and that the case is one of an ordinary sprained ankle. The plaintiff himself testified that he laid aside his crutches about a month after the accident, but used a cane more or less until within three weeks of the trial,

which was in January after the accident,—a little over four months,—and that he had worked since the accident for eight days at carpenter work. Upon a consideration of the whole evidence, the court is of the opinion that the damages are so excessive as to justify the conclusion that they were given under the influence of prejudice, and that for this reason a new trial ought to be granted, unless the plaintiff will consent to a reduction of the damages to \$1,250. As to this last conclusion of the court I dissent. In my opinion, the amount of damages was very liberal, but not so excessive as to justify this court in interfering with it.

3. The defendant assigns as error the ruling of the trial court in sustaining a challenge to a juror for cause. The ruling was right on the merits; but, were it otherwise, the ruling is not subject to review. *Perry v. Miller*, 61 Minn. 412, 63 N. W. 1040.

Error is also assigned to the ruling of the court in permitting the superintendent of the mill in which the accident occurred to be called for cross-examination, under the statute (G. S. 1894, § 5659), which provides that the directors, officers, superintendent, or managing agents of any corporation may be so called. The ruling was correct. The statute is a remedial one, and must be construed with reasonable liberality. To limit it, by construction, to the general officers of the corporation, as claimed by the defendant, would defeat the purpose of the statute; for, as a rule, such general officers have no personal knowledge as to what occurs in the actual work of the corporation. The statute includes any officer, superintendent, or agent having supervision or control of the work or act of the corporation involved in the case, whether his rank be that of a general officer or not.

We find no error in the record, except as to the award of damages.

It is therefore ordered that a new trial be granted, unless the plaintiff shall, within 20 days after the remittitur herein is sent down, file in the district court a stipulation signed by him or his attorney that the verdict may be reduced to \$1,250. If he does so, the order appealed from shall stand affirmed, and plaintiff shall be entitled to judgment on the verdict as so reduced.

DENNIS BOYLE v. MUSSER-SAUNTRY LAND, LOGGING &
MANUFACTURING COMPANY.

June 30, 1899.

Nos. 11,674—(200).

**Contract—Banking Logs—Scale of Surveyor General Conclusive—Ex-
ception.**

This is an action to recover a balance alleged to be due upon a contract for cutting and banking logs. The contract provided that the surveyor general's scale of the logs should be final and conclusive. *Held*, that such scale is conclusive upon the parties as to the amount of logs cut and banked by the plaintiff, unless it was fraudulent, or grossly inaccurate, or the defendant by its wrongful act or neglect prevented a scale of all the logs being made.

Same—Impeachment of Scale.

Held, further, that certain evidence offered for the purpose of impeaching the surveyor general's scale was correctly rejected by the trial court.

Action in the district court for Washington county to recover \$7,038.10 for cutting and banking logs. The case was tried before Williston, J., who found in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. *Affirmed*.

J. N. Searles, for appellant.

Clapp & Macartney, for respondent.

START, C. J.

This is an action by the plaintiff to recover an alleged balance due him for cutting and banking logs during the seasons of 1892–93 to 1896–97, inclusive, pursuant to a written contract. The cause was tried by the court without a jury, and resulted in findings of fact and conclusions of law in favor of the defendant. The plaintiff appealed from an order denying his motion for a new trial.

The contract was made November 20, 1889, between the defendant and David C. Gaslin, and on September 4, 1891, the latter, with the consent of the defendant, assigned his right and interest in the contract to the plaintiff, who, for convenience, may be here treated as if one of the original parties thereto. The contract provided for the scaling of all logs, as fast as banked, by a competent scaler, to

77	206
86	161
186	162

be agreed upon by the parties, and they were so scaled. The plaintiff was to receive \$3 per 1,000 feet for all logs cut, hauled, and landed on the Tamarac river, and \$3.50 per 1,000 feet on the main St. Croix river, payment thereof to be made as follows:

"One-third of the whole amount due for cutting, banking, or delivering any of said logs, on the first day of April of each year after such logs have been so cut, banked, and delivered; one-third of such amount on the first day of June next thereafter; and the remaining one-third on the next succeeding first day of September. And it is hereby mutually agreed as follows: That the above payments shall be made according to the landing scale of said logs, provided the landing scale shall be considered final; but, in case the landing scale is not final, the first and second payments shall be made according to the landing scale; but the third and last payment shall be due and payable when the final scale is made by the surveyor general, as hereinbefore provided, and any differences that may be shown by such rescale shall be adjusted when the last payment is made each year."

The contract also contained this provision:

"It is hereby mutually agreed between the parties hereto that should the first-named party be dissatisfied with the landing scale of said logs, and serve a written notice of such dissatisfaction on the parties of the second part prior to the first day of April in each year after said logs are scaled, then, and in that case, the landing scale of said logs shall not be considered final and conclusive between the parties hereto, but a rescale of all of said logs shall be made in Lake St. Croix by the surveyor general of logs and lumber for the first lumber district of the state of Minnesota, which rescale shall be final and conclusive between the parties hereto, and the expense of such rescale shall be borne equally between the parties hereto."

There is no controversy between the parties as to the logs cut and banked under the contract prior to the season of 1892-93. The parties have fully settled for such logs according to the landing scale. But in the spring of 1893, and each year thereafter, the plaintiff served notice upon the defendant that he was dissatisfied with the landing scale, and requested that the final settlement be made on the basis of the surveyor general's scale in Lake St. Croix, as provided by the contract. It is not claimed by the plaintiff that he has not been paid according to the contract for all logs cut and

banked during the seasons of 1892-93 to 1896-97, inclusive, so far as they have been scaled by the surveyor general. He claims, however, that he cut and banked 2,084,469 feet in excess of the amount shown by the scale of the surveyor general during the years in controversy, and to recover the contract price for this alleged shortage this action was brought.

The assignments of error relate to the rulings of the trial court in excluding evidence offered by the plaintiff tending, as he asserts, to establish this claim. The correctness of the court's rulings must be determined by the contract of the parties. The plaintiff's construction of the contract is that the surveyor general's scale is conclusive evidence of the number and quantity of only such logs as were scaled by him, and not evidence that there were no other logs landed by the plaintiff than those scaled by him.

Such a construction of the contract is not justified either by its letter or spirit, for the parties carefully stipulated for only two methods for ascertaining the amount of logs cut and banked by the plaintiff. One was the landing scale; the other was the surveyor general's scale to be made in Lake St. Croix; and, in either case, the scale was to be conclusive. After the plaintiff elected to have the logs scaled by the surveyor general, the only use to be made of the landing scale was to determine tentatively the amount of the first and second payments to be made on the contract, to be finally adjusted on the last payment to be made each year on the surveyor general's final scale, and to ascertain the proportion of the logs delivered at each landing. The plaintiff, by his election, assumed, to the extent of his compensation therefor, the loss of all logs incident to the driving of them to the lake in the usual way. We therefore hold that, by virtue of the contract of the parties, the scale of the surveyor general is conclusive upon them as to the amount of logs cut and banked by the plaintiff under this contract, unless it was fraudulent or grossly inaccurate, or the defendant, by its wrongful act or neglect, prevented a scale of all of the logs being made. *Johnson v. Howard*, 20 Minn. 322 (370); *Leighton v. Grant*, 20 Minn. 298 (345); *Jesmer v. Rines*, 37 Minn. 477, 35 N. W. 180.

The burden was on the plaintiff so to impeach the surveyor gen-

eral's scale by competent evidence. The plaintiff for this purpose offered the landing scales, but they were excluded by the court, on the defendant's objection. The court also sustained an objection to a question put to the plaintiff by his counsel to the effect whether, if there were any logs banked under the contract which, as claimed, were not included in the surveyor general's scales, they were of the same average size and quality as the logs included in such scale. These rulings are assigned as error.

The surveyor general's scale was received in evidence without objection. There was neither evidence, nor offer of evidence, to show that the defendant did not drive all the logs cut and banked by the plaintiff into Lake St. Croix, where they were to be scaled by the surveyor general, but, on the contrary, the complaint expressly alleged that all logs so cut and banked came through and down into the lake about July 1, 1898. The purpose for which the evidence rejected by the court was offered, while not directly stated in the record, is perfectly manifest. The plaintiff sought to show by the landing scale only the number of logs cut, rejecting the measurement as shown by such scale, and to use the surveyor general's scale only for the purpose of ascertaining, in connection with the proposed oral evidence, the average number of feet in each log; then, by multiplying this average by the number of logs shown by the landing scale, the product would be the number of feet claimed to have been banked by him. If there had been any competent evidence in the case to impeach the surveyor general's scale, and to establish with any degree of certainty the number of logs actually banked and omitted from the official scale, if any, we are not prepared to say that the oral evidence offered was not competent. But the landing scale, which the plaintiff himself had discredited and rejected, was not competent evidence to impeach the surveyor general's scale, which he had stipulated should be conclusive and final, both as to the number of logs and the number of feet therein. To hold otherwise would simply result in substituting the landing scale for the surveyor general's scale, contrary to the express contract of the parties. The ruling of the court in excluding the evidence was correct.

The plaintiff testified that the logs accumulated in the lake some length of time before they were scaled, some of them for two and three years; also that logs lying in the water lose their bark. He was then asked these questions:

"Would that fact injure the log, and reduce the quality of merchantable timber that would be found in it when it was scaled?"

"Does the log lose its mark sometimes when it loses its bark?"

An answer to these questions was promptly excluded by the court on the objection of the defendant. There was no evidence that the plaintiff ever requested that the logs should be scaled earlier than they were, or that the delay was due to the act or neglect of the defendant. Besides, the proposed evidence was too indefinite and uncertain to furnish a basis for rejecting the official scale.

The remaining assignments of error have been considered, but we do not deem it necessary to refer to them specifically, for they are clearly without merit. If all the evidence offered by the plaintiff, and rejected by the court, had been received, it would not have justified the conclusion that the surveyor general's scale was fraudulent, or grossly inaccurate, or that defendant, by any wrongful act or neglect on its part, prevented a scale of all of the logs cut and banked by the plaintiff which land into the lake where they were to be scaled.

Order affirmed.

W. W. STRICKLAND v. MINNESOTA TYPE-FOUNDRY COMPANY.

June 30, 1899.

Nos. 11,703—(190).

Chattel Mortgage for Purchase Price.

Held, upon the facts found by the trial court, that the chattel mortgage here in question was given to secure the purchase money.

Same—Title in Mortgagee—Action for Conversion—Allegation of Non-payment Unnecessary.

A chattel mortgage vests the legal title to the property mortgaged in

the mortgagee, and he may maintain an action for its conversion, in the form of an action of trover. He is not required, in such an action, to allege nonpayment of his mortgage in his complaint.

Action in the district court for Ramsey county for conversion. The case was tried before Kelly, J., who found in favor of defendant; and from a judgment entered pursuant to the findings, plaintiff appealed. Reversed.

Oscar Hallam, for appellant.

Where an indebtedness is proved, payment is matter of defense. Bliss, Code Pl. § 357; *Lerche v. Brasher*, 104 N. Y. 157. In conversion the value of the property is prima facie the measure of damages, though plaintiff has only a special interest. *Jellett v. St. Paul, M. & M. Ry. Co.*, 30 Minn. 265. Proof of an interest in defendant is matter of mitigation and recoupment. The rule is the same whether the action is against the mortgagor or a purchaser from him. *Jones*, Chat. Mort. § 444; *Brooks v. Briggs*, 32 Me. 447; *Parish v. Wheeler*, 22 N. Y. 494; *Davis v. Mills*, 18 Pick. 394; *Smith v. Johns*, 3 Gray, 517; *Chamberlin v. Shaw*, 18 Pick. 278; *Sedgwick, Dam.* 482; *Hardin v. Palmerlee*, 28 Minn. 450; *Howard v. Barton*, 28 Minn. 116. The right of recoupment is equitable. *Peck v. Inlow*, 38 Ky. 192. See *Cushing v. Seymour, Sabin & Co.*, 30 Minn. 301; *Hoxsie v. Empire Lumber Co.*, 41 Minn. 548. The same rules as to reduction by payment as matter of defense and as to burden of proof prevail in actions for conversion of notes and mortgages. *Booth v. Powers*, 56 N. Y. 22; *Thayer v. Manley*, 73 N. Y. 305; *Hershey v. Walsh*, 38 Minn. 521; *Grigsby v. Day*, 9 S. D. 585; *Holt v. Van Eps*, 1 Dak. 206; 4 Am. & Eng. Enc. 124.

It does, however, affirmatively appear that the note and mortgage are unpaid. Possession and production by plaintiff was prima facie evidence thereof. *Mantonya v. Martin*, 172 Ill. 92. Neither the mortgagee's right of possession nor his right to sue are affected by the existence of other securities, unless it be made to appear that the mortgagee has converted or received the benefit of them. *Close v. Hodges*, 44 Minn. 204; *Huellmantel v. Vinton*, 112 Mich. 47; *Coughran v. Sundback*, 9 S. D. 483. Plaintiff's legal title was established by the mortgage, default, and possession.

Powell v. Gagnon, 52 Minn. 232; *Smith v. Konst*, 50 Wis. 360. Such title and rights are presumed to continue till the contrary is shown. *Lind v. Lind*, 53 Minn. 48. It is immaterial that plaintiff does not demand the precise damages to which he is entitled, or mistakes the true rule, where the complaint shows a legal wrong and resulting injury. 5 Enc. Pl. & Pr. 707, 708; *Weaver v. Mississippi & R. R. Boom Co.*, 28 Minn. 542; *Colrick v. Swinburne*, 105 N. Y. 503. Conversion may be proved by evidence that defendant purchased from the mortgagor and resold. *Nichols & S. Co. v. Minnesota T. Mnfg. Co.*, 70 Minn. 528. The amendment should have been allowed. 1 Enc. Pl. & Pr. 600; *Fletcher v. Forler*, 83 Mich. 52; *Shieffelin v. Whipple*, 10 Wis. 81. Evidence of the price for which defendant sold is evidence of value. *Buford v. McGetchie*, 60 Iowa, 298. The mortgage was a purchase-money mortgage. *Wheadon v. Mead*, 72 Minn. 372; *Olcott v. Tioga*, 40 Barb. 179, 190. Being a purchase-money mortgage, the wife's signature was unnecessary. *Barker v. Kelderhouse*, 8 Minn. 178 (207). Filing the mortgage gave constructive notice. *Webb*, Rec. Tit. § 186; *Zimpelman v. Robb*, 53 Tex. 274; *Le Neve v. Le Neve*, 2 White & T. Lead. Cas. pt. 1, 109, 127. The filing in Wisconsin was constructive notice in Minnesota. *Keenan v. Stimson*, 32 Minn. 377.

John F. Hilscher, for respondent.

The mortgage was void as against purchasers in good faith without actual notice, because on exempt property, and the wife's signature was attested by only one witness. *Sanborn & B. Ann. St. Wis.* § 2313; *Maier v. Davis*, 57 Wis. 212; *Rockwell v. Humphrey*, 57 Wis. 410. Record of a void mortgage imports no notice. *Smith v. Clark*, 100 Iowa, 605. The mortgage was not a purchase-money mortgage. The transaction was a loan by Strickland to Moulton. *Eyster v. Hatheway*, 50 Ill. 521, 525; *Heusler v. Nickum*, 38 Md. 270, 279; *Stansell v. Roberts*, 13 Ohio, 149; *Alderson v. Ames*, 6 Md. 52; *Small v. Stagg*, 95 Ill. 39. Borrowed money being the consideration from Kimball to Strickland would continue to be the consideration for the mortgage given in substitution. *Austin v. Underwood*, 37 Ill. 438; *Flanagan v. Cushman*, 48 Tex. 241. As against third persons, a chattel mortgage lien can be preserved

only by retention of possession or by recording a properly executed and acknowledged mortgage. *Blatchford v. Boyden*, 122 Ill. 657. In order to prove indebtedness, it must be alleged. It was essential for plaintiff to prove that at the time of the alleged conversion he had a valid lien. This he could not do in absence of allegations of facts creating such lien. *Griggs v. City of St. Paul*, 9 Minn. 231 (246). As against one claiming under the mortgagor, plaintiff's right to damages was limited to the amount due at commencement of action. *Smith v. Koust*, 50 Wis. 360; *Olcott v. Tioga*, 40 Barb. 179; *La Crosse & M. S. P. Co. v. Robertson*, 13 Minn. 269 (291); *Becker v. Dunham*, 27 Minn. 32.

START, C. J.¹

Action for conversion of certain personal property by the holder of a chattel mortgage thereon.

The complaint alleged that on October 9, 1889, the then owner of the property, for the purpose of securing a part of the purchase money due therefor, executed a chattel mortgage thereon, which his wife also signed, to Selah Strickland, to secure the payment to him of the sum of \$800, due in one year, with interest, according to a promissory note therein described; that the mortgage was duly filed, and that on December 1, 1890, the mortgagee took possession of the property by virtue of his mortgage, and retained it until May 2, 1891, when the defendant wrongfully took and converted it to its own use; that it was then of the value of \$800; and that the plaintiff has succeeded by assignment to all the rights of Strickland in the premises. The complaint did not allege nonpayment of the mortgage. The answer put in issue the allegations of the complaint, and alleged that the defendant purchased the property from the owner in good faith, and that it was of no greater value than \$200. The answer did not allege that the mortgage had been paid or satisfied.

On the trial the note and mortgage were received in evidence. The plaintiff then offered to prove that no part of either had ever been paid, which was excluded by the trial court on the ground that nonpayment was not alleged in the complaint. The plaintiff then

¹ MITCHELL, J., took no part.

asked leave to amend the complaint to meet the views of the court, which was refused. The trial court made its findings of fact, and, as a conclusion, directed judgment for the defendant on the merits. It was so entered, and the plaintiff appealed.

The material facts, as found by the trial court, briefly stated, are these: On October 9, 1889, M. B. Kimball was the owner of a Potter cylinder printing press, with the other printing material described in the complaint, subject to two mortgages executed by Kimball,—one for \$750 and interest, to Selah Strickland, for borrowed money; and on that day he sold the property to George D. Moulton for the agreed price of \$1,500, part of which he paid in cash, and part secured as hereinafter stated.

“Moulton, as part of the consideration for the sale and delivery to him of said printing press and other printing material, and as part of the same transaction, on said October 9, 1889, at the request of said Kimball, who acted with the authority and consent of said Selah Strickland, made and delivered his promissory note for \$800, bearing interest from date at 10 per cent. per annum, and payable one year from date to the order of Selah Strickland. And, to secure the same, George D. Moulton and Julia Moulton, his wife, at the same time also executed and delivered the chattel mortgage described in the complaint [on the press and materials]. That said mortgage was filed on October 10, 1889, in the office of the city clerk of the said city of Superior, Wisconsin [the city where the parties resided, and the property then was], where it has ever since remained on file.”

A printing press and materials used in the business of a printer or publisher, to an amount not exceeding \$1,500, are exempt from execution by the laws of Wisconsin; and no mortgage on exempt property by a married man is valid, unless signed by his wife in the presence of two subscribing witnesses. The mortgagor in this case was a married man, and the property exempt. His wife signed the mortgage, but there was only one subscribing witness. The mortgagee, by his agent, took possession of the mortgaged property in December, 1890, and on May 2, 1891, the mortgagor, Moulton, shipped the printing press to the defendant, at St. Paul. The defendant had no notice whatever of any of the foregoing facts, and no notice of the existence of the mortgage, save such as may be implied by law. The defendant received the press in ordinary course

of business, and in good faith; and thereafter, and without any other notice, in good faith bought the printing press from Moulton, and paid him therefor the sum of \$350. It was not made to appear either that the mortgage had been foreclosed, or any steps thereto taken, save as here stated, or that the debt in the mortgage described, or any or what part thereof, remained unpaid. The plaintiff has, by assignment, succeeded to the rights of the mortgagee. The court did not find the value of the property.

These facts present two questions for our consideration: (a) Was the chattel mortgage given for a part of the purchase price of the property mortgaged? (b) Was it essential that the complaint should allege nonpayment of the note and mortgage?

The trial court held that the mortgage was given for purchase money, hence it was valid without the wife's signature. The counsel for defendant does not concede this proposition, but, on the contrary, he here insists, in support of the legal conclusion of the trial court, that the mortgage was not given for any part of the purchase price of the mortgaged property, and that it is therefore void. It is quite evident from his brief that counsel misapprehends the facts found by the trial court. The finding was not that Moulton bought the property subject to the prior mortgage of Strickland, but that the purchase price was \$1,500, part of which he paid in cash, "and part secured as hereinafter found." Then the court finds as a fact that Moulton, as a part of the consideration of the sale of the property to him, gave the mortgage here in question, which is the part of the purchase price of \$1,500, which was "secured as hereinafter found." The findings of the trial court, when taken together, are to the effect that the mortgage from Moulton to Strickland was given for a part of the purchase price of the mortgaged property. If Moulton had executed a mortgage to Kimball for \$800, as a part of the consideration of the sale of the property to him, and Kimball had assigned the mortgage to Strickland in payment of his prior mortgage, it would be perfectly clear that the mortgage would have been, in the hands of Strickland, a purchase-money mortgage. Now, the fact that, by the agreement of the parties, the mortgage was made directly to Strickland in the first instance, does not change the character of the mortgage as one for the purchase

money, and such a mortgage we hold it to be." *Wheadon v. Mead*, 72 Minn. 372, 75 N. W. 598. It being a purchase-money mortgage, it was valid without the wife's signature. *Barker v. Kelderhouse*, 8 Minn. 178 (207).

The mortgage, although made and filed in the state of Wisconsin, where all the parties thereto resided, and where the property was situated, was constructive notice to the defendant. *Keenan v. Stimson*, 32 Minn. 377, 20 N. W. 364. The defendant, while practically conceding this, insists that the mortgage does not indicate on its face that it was given for the purchase price of the mortgaged property; hence, it did not import notice to purchasers that it was valid, although it covered exempt property. But it does not appear on the face of the mortgage that the property was exempt, for it does not appear from the mortgage that the press and printing material were used in the business of the mortgagor, as a printer or publisher. The mortgage being in fact and law a valid lien on the property therein described, the defendant purchased the property subject to such lien.

Was it essential in this case that the complaint should allege nonpayment of the note and mortgage?

The trial court held that it was, and on this ground ordered judgment for the defendant. A chattel mortgage vests the legal title to the property mortgaged in the mortgagee, and he may maintain an action for a conversion of it, in the form of an action of trover. *Fletcher v. Neudeck*, 30 Minn. 125, 14 N. W. 513; *Kellogg v. Olson*, 34 Minn. 103, 24 N. W. 364; *Adamson v. Petersen*, 35 Minn. 529, 29 N. W. 321; *Jones, Chat. Mort. § 444*; 4 Enc. Pl. & Pr. 513. In such a case it is not necessary for the mortgagee to allege nonpayment of his mortgage. Payment of the mortgage debt in whole or in part is a matter of defense. *Jones, Chat. Mort. § 444*; *Brooks v. Briggs*, 32 Me. 447. Counsel for the defendant concedes this general rule, and admits that it would be applicable to this action if it was against the mortgagor or a stranger who never had any right to the property; but he insists that it does not apply to the defendant, a purchaser from the mortgagor, who never promised to pay the mortgage debt, and who could have no knowledge as to whether the mortgage debt was paid or not. This may be a good reason

why the burden of proving nonpayment should be cast upon the plaintiff after the defendant had made proof that he was a bona fide purchaser of the property, without notice in fact of the mortgage, but it has nothing to do with the question whether the complaint states a cause of action. It is a question of evidence, not of pleading.

It is true that in an action by the mortgagee for a conversion of the chattels, against the mortgagor or those claiming under him, the recovery is limited to the amount due on the mortgage, not exceeding the value of the property. *Becker v. Dunham*, 27 Minn. 32, 6 N. W. 406. If, however, the action is against a stranger, the mortgagee may recover the full value of the property. *Adamson v. Petersen*, *supra*. Or, in other words, the measure of damages in such a case is *prima facie* the value of the property at the time of the conversion; but, when it is made to appear that the defendant claims under the mortgagor, the recovery will be limited to the amount due on the mortgage, not exceeding the value of the property. It does not appear from the complaint what the relations of the defendant to the property were. The plaintiff was not presumed to know, and he alleged a conversion of the property, and its value at the time of the conversion.

The trial court, on a motion by the defendant for judgment on the pleadings, on the ground that the complaint did not allege nonpayment of the mortgage, held the complaint good because it proceeded on the theory that the defendant never had any interest in the property; but, when it appeared on the trial that the defendant was a purchaser from the mortgagor, the court refused to permit the plaintiff to show the amount due on the mortgage, because nonpayment was not alleged in the complaint, denied plaintiff's application to amend, and made the finding to the effect that it was not made to appear that the mortgage debt, or any or what part thereof, remained unpaid, and based the conclusion that the defendant was entitled to judgment on such finding. The complaint stated a cause of action when the trial commenced, and the fact that it was developed on the trial that proof of the amount due on the mortgage was necessary in order to assess the damages on an equitable basis could not affect the question of the sufficiency of the complaint.

The evidence as to how much was due on the mortgage was in mitigation of damages, and logically the burden was on the defendant to offer such evidence; but, were it otherwise, it is clear that it was not the fault of plaintiff's counsel that such proof was not made. He offered to make the proof, and, when it was refused on the ground that nonpayment should have been alleged in the complaint, he asked to so amend the complaint. The complaint was sufficient, and assuming, without so deciding, that the burden of proving nonpayment of the mortgage was on the plaintiff, the trial court erred in refusing to receive the offered proof.

The court also erred in directing judgment on the facts found for the defendant, for the answer admitted that the value of the property was \$200, and prima facie the plaintiff was entitled to recover this amount on the facts found.

Judgment reversed, and a new trial granted.

FRANK H. PETERSON v. WILLIAM H. VANDERBURGH.

77	218
d88	218

June 30, 1899.

Nos. 11,709—(213).

Equity—Action against Co-Executor—Demurrer.

A court of equity will entertain an action brought by an executor on the part of the estate against a co-executor to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other case, where justice requires it, there being no remedy at law.

Action in the district court for Hennepin county by plaintiff, as executor of the will of Charles E. Vanderburgh, deceased. The complaint alleged among other things that defendant, who was a co-executor of the will and a son of the testator, had borrowed from him sums amounting to \$23,896.98, of which defendant had repaid only \$15,571.66; that defendant claimed offsets, and refused to pay the balance due until the amount was determined and the offsets allowed. The complaint prayed for an accounting and for judgment for the amount which should be found due from defend-

ant to the estate. From an order, McGee, J., sustaining a demurrer to the complaint, plaintiff appealed. Reversed.

H. V. Mercer, for appellant.

As a rule co-executors cannot sue or be sued at law by one another. Schouler, Exrs. & Adms. 403; 3 Williams, Exrs. (Perk. Notes) 1911; 3 Redfield, Wills, 203; 1 Pomeroy, Eq. Jur. § 51; 8 Enc. Pl. & Pr. 699; Sandars, Just. (Hammond) 327; McGregor v. McGregor, 35 N. Y. 218; Rogers v. Rogers, 75 Hun, 133; Executors v. Geer, 30 N. J. Eq. 249. At common law an executor or administrator cannot sue his co-executor or co-administrator to recover a debt due his testator or intestate. 8 Enc. Pl. & Pr. 699; Executors v. Geer, supra; 1 Pomeroy, Eq. Jur. § 51; Schouler, Exrs. & Adms. § 403; 3 Williams, Exrs. (Perk. Notes) 1911; 3 Redfield, Wills, 203, 223; Peake v. Ledger, 8 Hare (Eng. Ch.) 313; Case's Appeal, 35 Conn. 115; Evans v. Evans, 23 N. J. Eq. 71; Storms v. Quackenbush, 34 N. J. Eq. 201; Crane v. Howell, 35 N. J. Eq. 374; Stimis v. Stimis, 54 N. J. Eq. 17; McGregor v. McGregor, supra; Rogers v. Rogers, supra. Equity, however, will entertain a suit by one executor on part of the estate to enforce a claim against his co-executor on an account or to foreclose a mortgage, or in any other case where justice requires, if there be no remedy at law. Sandars, Just. (Hammond) 327; 1 Pomeroy, Eq. Jur. § 51; Schouler, Exrs. & Adms. § 403; 3 Williams, Exrs. (Perk. Notes) 1911; 3 Redfield, Wills, 203, 223; Const. art. 1, § 8, and cases last cited.

There is no remedy in the probate court, because its jurisdiction is limited to estates of deceased persons, and it has no equitable jurisdiction. R. S. 1851, 290; Const. art. 6, § 1; art. 7, § 7; G. S. 1894, §§ 4511-4520, 4665; State v. Probate Court of Sibley Co., 33 Minn. 94; Mousseau v. Mousseau, 40 Minn. 236; Comstock v. Matthews, 55 Minn. 111; In re Martin's Estate, 56 Minn. 420; Oswald v. Pillsbury, 61 Minn. 520. "Original" jurisdiction is not equivalent to exclusive jurisdiction. Agin v. Heyward, 6 Minn. 53 (110); Crowell v. Lambert, 10 Minn. 295 (369). See Farnham v. Thompson, 34 Minn. 330; Starkey v. Sweeney, 71 Minn. 241. The complaint shows that the estate is entitled to relief, that there is no remedy at law, and that the action is equitable. Sandars, Just.

(Hammond) 327; 1 Pomeroy, Eq. Jur. § 51; Schouler, Exrs. & Admsrs. § 403; 3 Williams, Exrs. (Perk. Notes) 1911; 3 Redfield, Wills, 203, 223; Peake v. Ledger, *supra*; Evans v. Evans, *supra*; Storms v. Quackenbush, *supra*; Crane v. Howell, *supra*; Stimis v. Stimis, *supra*; McGregor v. McGregor, *supra*; Rogers v. Rogers, *supra*; Const. art. 1, § 8.

How & Butler, for respondent.

In nearly all states chancery declines to interfere where the probate court has jurisdiction. Frey v. Demarest, 16 N. J. Eq. 236. In Minnesota the jurisdiction of probate courts over the estates of deceased persons is exclusive for administering such estates, including all matters necessarily pertaining to the proper administration. Mousseau v. Mousseau, 40 Minn. 236; Boltz v. Schutz, 61 Minn. 444, 446. When the testator appoints a debtor his executor the debt becomes on his qualification assets in his hands, applicable to the expense of administration and the purposes of the will. Stevens v. Gaylord, 11 Mass. 255, 269; Crow v. Conant, 90 Mich. 247; Gardner v. Miller, 19 Johns. 187; Bigelow v. Bigelow, 4 Ohio, 138; Norris v. Towle, 54 N. H. 290; In re Armstrong, 69 Cal. 239; Cook v. Cook, 69 Ala. 294; Bacon v. Fairman, 6 Conn. 121, 129. In the constitutional provision giving the probate court jurisdiction over estates of deceased persons, "estate" means every species of property, real and personal. Deering v. Tucker, 55 Me. 284, 287; Sutton v. Wood, 1 N. C. 312. Laws 1849, c. 20, subd. 3, in force when the constitution was adopted, gave the probate court jurisdiction for "settlement of accounts" of executors. This power has ever since existed. If defendant were sole executor, he would be accountable for his indebtedness as an asset in the probate court; and if the amount is in dispute, that court has power to determine the matter as if the asset had been received from any other source. Wood v. Executors, 1 N. J. L. 177, 181. The appointment of two executors cannot affect the rule. Simon v. Albright, 12 S. & R. 429.

COLLINS, J.¹

Plaintiff brought a bill in equity, and defendant demurred upon

¹ MITCHELL, J., absent, did not take part.

the ground that the district court had no jurisdiction of the subject of the action. Plaintiff appeals from an order sustaining the demurrer.

The question to be determined is, has an executor in this state the right to bring a bill in equity in the district court against a co-executor for the purpose of having the amount determined, and to enforce a claim held by the estate against such co-executor, arising on contract entered into with the testator in his lifetime, and due at the time of his decease, when the co-executor disputes the amount and refuses to pay until such amount is ascertained? Plaintiff's counsel admits that at common law such an action cannot be maintained, but he insists that in equity the rule is to the contrary, and that one executor or administrator may bring a bill against a co-executor, when justice requires it, to ascertain the amount and to enforce a claim of this character. The position of defendant's counsel is that, where a testator appoints a debtor his executor, the debt becomes, immediately upon his qualification as executor, an asset in his hands, applicable to the purposes of the will, and for which he can only be compelled to account in the probate court, precisely as he must account for other assets, and that, where the amount of the debt is in dispute, the probate court has full power to hear and determine the amount of such indebtedness, as between the estate and the executor.

The jurisdiction of the probate court in this state is fixed by the fundamental law. Const. art. 6, § 7. Its jurisdiction is expressly limited and restricted to the estates of deceased persons and persons under guardianship. If, under this provision, the probate court has exclusive jurisdiction over the subject of this action, the order of the court below was right, and should be affirmed. But if exclusive jurisdiction has not been conferred on the probate court, and if the district court has not been deprived of jurisdiction, the action may be maintained, and the trial court erred when sustaining the demurrer. Even if it be admitted that the probate court can have jurisdiction by holding the debt to have become an asset in defendant's hands immediately upon his qualification as an executor, and by enforcing its collection in the settlement of his trust account, it would not follow that, where justice required it, and

there was no remedy at law, an equitable action could not be maintained in district court for the purpose of ascertaining the amount of a disputed claim and for such other purpose as equity might require. Such a case would simply be one of concurrent jurisdiction, and not at all novel. But, in any event, it seems to be well settled that a court of equity will entertain an action brought by one executor on the part of the estate against a co-executor to determine the amount of a disputed claim, or to force an account, or to foreclose a mortgage, or in any other case where justice requires it, there being no remedy at law. Schouler, Exrs. § 403; 3 Williams, Exrs. (Perk. Notes) 2024; 1 Pomeroy, Eq. Jur. § 51; 3 Redfield, Wills, 203, 235; 8 Enc. Pl. & Pr. 699; and the many cases cited in these books. See also *Rogers v. Rogers*, 75 Hun, 133, 27 N. Y. Supp. 276.

This rule is in the right direction beyond question, and covers the complaint now before us. Nor does this rule infringe upon that laid down in the cases cited by defendant's counsel, seemingly, to the effect that it is the equitable doctrine that, where a debtor is appointed executor of the will of his creditor and accepts the trust, the debt is presumed to have been paid, is to be treated as an asset in the executor's hands, and stands upon the same footing as other assets, to be accounted for in settlement of the estate, and in no other manner. The question now before us did not appear in any of those cases, and nowhere is it intimated that a bill in equity will not lie in favor of one executor or administrator, and against a co-executor or administrator, when the latter disputes the amount of an alleged indebtedness and refuses to pay, if justice requires the bringing of such an action, and there is no adequate remedy at law.

Order reversed.

CANTY, J.

I concur. Our constitution gives the probate court exclusive jurisdiction of certain matters, which implies that it has no jurisdiction of other matters. Then it is not often that the probate court and the district court have concurrent jurisdiction. But, as regards such question of concurrent jurisdiction, an indebtedness due from a co-executor to the estate, and incurred during the life of the testator, stands on the same footing as an indebtedness

due from a third party to the estate, incurred during the life of the testator. The district court has jurisdiction of an action brought by the executor against such third party in such a case. But, if the third party should file a claim against the estate in the probate court, the executor could plead in that court, as an offset or counterclaim, the indebtedness due from the third party to the estate. In this manner, the two courts have concurrent jurisdiction. As affecting this question of concurrent jurisdiction, it is immaterial that the indebtedness is due to the estate from a co-executor, instead of from a third party. The district court still has jurisdiction, and the action may be brought in equity in that court by the other co-executor. Of course, the existence of other facts may or will, before the estate is settled, draw the claim into the probate court, and give that court jurisdiction, just as the existence of other facts would draw to that court such a claim against a third party, and give that court jurisdiction over that claim. In my opinion, these are the principles on which the district court and the probate court have concurrent jurisdiction in such a case as this.

STATE ex rel. RAILROAD AND WAREHOUSE COMMISSION v. W. W. CARGILL COMPANY.

July 3, 1899.

Nos. 11,521—(22).

Grain Warehouse for Owner's Grain—Laws 1895, c. 148, Applicable—License.

The defendant operates a grain warehouse, in a village in this state, in which no grain is stored but defendant's own, which it purchases of the farmers at the warehouse where the grain is so delivered, and where it is weighed and graded by defendant on its own scales and with its own appliances. *Held*, the business so carried on is of such a public character, and sufficiently affected with a public interest, that the legislature may require persons operating such warehouse to take out a license therefor as provided in Laws 1895, c. 148.

Action in the district court for Ramsey county to restrain defendant from operating its elevator in receiving, shipping, storing or

handling grain until it should have been licensed by relator. The case was tried before Bunn, J., who found in favor of defendant; and from a judgment entered pursuant to the findings, relator appealed. Reversed.

H. W. Childs, Attorney General, for appellant.

Koon, Whelan & Bennett, for respondent.

The rules for interpretation and construction of statutes are the same in equity as at law. Fonb. 22, note h. By the act in question the legislature intended to place under supervision of the commission all nonterminal grain elevators, belonging to private corporations or individuals, on any railroad right of way or land of a railway company, to be used in connection with its line, whether operated wholly or in part for the public, for or without hire, or solely for use and benefit of the owner or possessor. See *Markby, Ele. Law*, § 72; *Potter's Dwarries, St. & Const.* 193. Statutes of this nature which have been held constitutional have been statutes regulating the receiving, shipping, handling and storing of grain for the public for compensation, and enacted as police regulations. *Munn v. Illinois*, 94 U. S. 113; *Munn v. People*, 69 Ill. 80; *Wabash, St. L. & Pac. Ry. Co. v. Illinois*, 118 U. S. 557, 569; *Budd v. New York*, 143 U. S. 517; *People v. Budd*, 117 N. Y. 1; *Brass v. North Dakota*, 153 U. S. 391; *Granger Cases*, 94 U. S. 155; *Rippe v. Becker*, 56 Minn. 100; *Gurney v. Minneapolis U. Ele. Co.*, 63 Minn. 70; *Stewart v. Great N. Ry. Co.*, 65 Minn. 515. The police power is not co-terminous with the whole end and object of government, or identical with sovereignty, and is to be distinguished from the power of government to provide for the general welfare. *Tiedeman, Pol. Pow.* § 1; *Cooley, Const. Lim.* 706; *Com. v. Alger*, 7 Cush. 53; *State v. Noyes*, 47 Me. 189; *Town v. Rose Hill*, 70 Ill. 191; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 21; *Wurts v. Hoagland*, 114 U. S. 606; *Tillman v. Kircher*, 64 Ind. 104; *Passenger Cases*, 7 How. 283; *License Cases*, 5 How. 504; 7 *Bluntschli, Mod. St.* 542, 276, 280; 2 *Hare, Const. Law*, 907, 908. The act is not within the police power, and is an arbitrary limitation on the rights of personal liberty and private property. *Rippe v. Becker*, *supra*; *Stewart v. Great N. Ry.*

Co., *supra*; *Brass v. North Dakota*, *supra*; *State v. Corbett*, 57 Minn. 345; *State v. Donaldson*, 41 Minn. 74; *State v. Chicago, M. & St. P. Ry. Co.*, 68 Minn. 381; *Hennington v. Georgia*, 163 U. S. 299; *Plessy v. Ferguson*, 163 U. S. 537; *Mugler v. Kansas*, 123 U. S. 623; *In re Jacobs*, 98 N. Y. 98; *Smyth v. Ames*, 169 U. S. 466. The act violates Const. (U. S.) art. 1, § 8, giving congress power to regulate foreign and interstate commerce. *U. S. v. Knight Co.*, 156 U. S. 1, 13; *County of Mobile v. Kimball*, 102 U. S. 691, 702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Kidd v. Pearson*, 128 U. S. 1.

CANTY, J.

Since April, 1894, the defendant has been operating a warehouse at Lanesboro, Minnesota, used by it for storing grain therein, but has never obtained from the state railroad and warehouse commission, pursuant to Laws 1895, c. 148, a license authorizing it to ship, store, or handle grain in such warehouse; and this is an action brought to enjoin defendant from so operating the same without a license. On the trial the court found for defendant, and plaintiff appeals from the judgment entered accordingly.

The defendant has never stored in this elevator any grain except its own, which it had bought of the farmers at the warehouse, and which was raised in this state, presumably in the vicinity of Lanesboro. The court below held that, as applied to such a case, said chapter 148 is unconstitutional; that this is a private warehouse, in which no grain was ever stored for others or for the public; and that, therefore, it was not affected with a public interest, and the state had no right to interfere, or regulate the manner of its use. This is also the position taken by respondent.

If the business carried on at this warehouse consisted of nothing more than storing defendant's own grain, we would concede that such business would warrant but little interference or regulation of it by the state. But that business does consist of something more. It was conceded on the argument, and is fairly to be inferred from the findings and stipulation of facts, that the grain is purchased, weighed, graded, and delivered at the warehouse, and that defendant, with its own scales and appliances, weighs and grades the grain. Under these circumstances, the warehouse is a sort of

public market place, where the farmers come with their grain for the purpose of selling the same, and where the purchaser, a party in interest, acts as market master, weigh master, inspector, and grader of the grain. Surely such a business is of a public character, and is sufficiently affected with a public interest to warrant a very considerable amount of regulation of it by the state. The business carried on by defendant at its warehouse is similar to that carried on at a large number of other warehouses and elevators in this state. The grain crops of this state constitute by far the most important part of its commerce, and its greatest resource. It is important to see that correct weights are had; that uniform grades are given; that the proper amount of dockage, and no more, is taken; that no dishonest practices are allowed, and no undue advantage is permitted to be taken.

Said chapter 148 requires the person operating such an elevator or warehouse to procure a license, to be issued by the state railroad and warehouse commission, for which a fee of one dollar per year must be paid. The act also provides that such license may be revoked by the commission if the warehouse or elevator is operated in violation or in disregard of the laws of this state. Section 2 provides that any person attempting to run such an elevator or warehouse without a license may be enjoined in a suit for that purpose. Section 3 provides that the commission may make suitable and necessary rules and regulations for the government of public country warehouses and elevators. Then follow other provisions. There are undoubtedly many provisions in the act which apply only to warehouses and elevators in which grain is stored for others or for the public, which provisions do not and cannot apply to such warehouses as the one here in question. There are, perhaps, provisions in the act which it would be unconstitutional to apply to such a warehouse as this. But these matters need not be considered at this time. The provision requiring a license is not one of these. This disposes of the only question argued which it is necessary to consider.

Judgment reversed, and a new trial granted.

MITCHELL, J. (dissenting).

In view of the facts, among others, that grain is the principal agricultural product of the state, that in the purchase and sale of it there is great liability to abuses in the matter of weights and grades, and that these are usually determined by the purchaser with his own instrumentalities, I agree with the court that, although the owner of a warehouse uses it exclusively for the storage of his own grain, yet if he uses it for the purpose of buying grain from the public, thus rendering it, in effect, a public market, his business is a proper subject of police regulation by the state, to the extent of providing such rules and regulations as are reasonably necessary to secure to the public just and correct weights and grades. The requirement of a license may be a reasonable regulation in such cases, as a means of enabling state officials to ascertain who are engaged in the business. In my opinion, this is the extent of the police power of the state in such cases. But in the act in question (Laws 1895, c. 148) the legislature have not proceeded on any such principle. They have declared all elevators and warehouses falling within the purview of the act, whether used for the storage of grain for others or not, to be public elevators, and subject to all the provisions of the act. These provisions constitute a system of rules and regulations, the different parts of which are so connected with, and dependent upon, each other, that it is in many instances impossible to separate them. Many of them are wholly inapplicable to warehouses not used for the storage of grain for others. The opinion of the court concedes this. Some of them are, in my judgment, clearly not within the police power of the state, as applied to warehouses not used for the storage of grain for others. As illustrating that the system of rules and regulations contained in the act was intended as a unit, applicable to all warehouses within the purview of the act, the fourth section, as I construe it, makes it compulsory on the owner of any such warehouse to engage in the business of storing grain for others,—a thing which is not within the police power of the state, unless the fact that the warehouse happens to be situated on land acquired by a railway company for right of way or for railway purposes in con-

nection with one of its stations or sidings gives the state that power,—a question not considered by the court.

As I understand the opinion of the majority, they propose to cut down the application of the act to warehouses not used for the storage of grain for others than the owner, to such parts of the act as are applicable and appropriate to such business, and to that extent hold it valid. In view of the connection and interdependency of the different provisions of the act, this will be a difficult if not an impossible thing to do. It would be a most unreasonable task to impose upon every owner of a warehouse used exclusively for the storage of his own grain bought from the public to determine what provisions or parts of provisions are applicable to his business. He can only know this with any certainty after the courts have, by a gradual process of exclusion and inclusion, decided all doubtful questions on the subject. It is possible that upon other points, not raised or presented, a different result might be arrived at; but, considering the case exclusively upon the lines followed by the majority of the court, I am of the opinion that the whole act should be held invalid as to warehouses not used for the storage of grain for others, and let the legislature hereafter pass an act containing provisions appropriate to that class of warehouses. The fact that the act applies only to elevators and warehouses on railroad right of way, depot grounds, or land acquired by a railroad company for railroad purposes at one of its stations or sidings, may suggest the question whether it is "class legislation"; but, as no such point has been raised, I have not considered it.

W. G. HOERR v. MARGARETHA MEIHOFFER.

July 3, 1899.

Nos. 11,604—(208).

Judgment—Issue of Execution Prior to Docketing of Judgment.

A judgment entered and docketed in the district court in one county was docketed in another two days after its entry. An execution directed to the sheriff of the latter county was issued and dated on the day the

judgment was entered, and such execution recited that the judgment was docketed in the latter county two days later. *Held*, the execution was irregular, but not void.

Judgment not Evidence of Antecedent Debt.

Plaintiff, claiming under a judgment creditor, brought this action to set aside as fraudulent as to creditors a conveyance made by the judgment debtor prior to the entry of the judgment. *Held*, the judgment is not, at least as against the grantee, evidence of the antecedent existence of the indebtedness for which the judgment was rendered.

Action in the district court for Martin county to determine adverse claims to real estate. The case was tried before Quinn, J., who found in favor of plaintiff; and from a judgment entered pursuant to the findings, defendant appealed. *Reversed*.

H. H. Dunn, for appellant.

Pfau & Pfau, for respondent.

CANTY, J.

On February 10, 1881, John Meihofer was the owner of an undivided one-half of a certain 80 acres of land in Martin county, in this state. On that day he and his wife conveyed the land to his brother, Martin Meihofer, and the deed was recorded March 2, 1881. On the same day, Nichols & Dean brought an action against John in Blue Earth county, where he then resided, and a writ of attachment was issued out of the district court of that county in that action, directed to the sheriff of Martin county, and was levied on the land as the property of John on March 3, 1881. On March 23, 1881, Nichols & Dean obtained judgment against John in that action for \$293.34, which judgment was docketed in Blue Earth county on that day, and in Martin county on March 25, 1881. On the day the judgment was entered, execution was issued thereon, directed to the sheriff of Martin county, dated that day, and reciting that the judgment was docketed in Martin county on March 25, 1881. This execution was levied on the land, which was sold thereunder on execution sale, and bid in by Nichols & Dean, on May 7, 1881. They sold the sheriff's certificate of the execution sale and all their interest in the land to this plaintiff February 29, 1882. Thereafter the time to redeem expired, and no redemption was made. On June 23, 1882,

Martin conveyed the premises to defendant, the said wife of his brother, John. This action was brought to determine the adverse claim of defendant. On the trial the court found for plaintiff, and from the judgment entered accordingly defendant appeals.

1. Appellant contends that the execution was and is void because it was issued before the judgment was docketed in Martin county, and because it recites the docketing of the judgment in that county two days after such execution was issued, and two days after its date. While, for these reasons, the execution was irregular, it was not void, but the irregularity was cured by the subsequent filing of the transcript and docketing of the judgment in Martin county two days after the execution issued, and the execution sale passed whatever title John Meihofner had at the time the judgment was so docketed. See *Gowan v. Fountain*, 50 Minn. 264, 266, 52 N. W. 862; *Chase v. Ostrom*, 50 Wis. 640, 7 N. W. 667; *Rogers v. Cherrier*, 75 Wis. 54, 43 N. W. 828, and cases cited.

2. Respondent claims that the deed from John and wife to his brother, Martin, and the deed from Martin back to John's wife, this appellant, were executed without consideration, and were made and received with intent to defraud the creditors of John; and the court so found. But appellant contends that there is no evidence that John was ever, prior to the entry of the judgment against him, indebted to Nichols & Dean, and that, therefore, plaintiff is not in position to impeach the conveyance from John to his wife through Martin. In our opinion, the point is well taken. The only evidence given on the trial of any such indebtedness was the evidence of defendant that her husband said he owed Nichols & Dean, in St. Paul, and the evidence of Martin that about the time the deed was made to him his brother, John, told him that he (John) owed Nichols & Dean, in St. Paul, but that he did not state how much he owed them. Even if it were held that this was competent as evidence to prove an indebtedness from John to Nichols & Dean, the amount of that indebtedness nowhere appears, and it does not appear that it was the same indebtedness for which the judgment was entered by Nichols & Dean against John. See *Bloom v. Moy*, 43 Minn. 397, 45 N. W. 715. This court has often held that a judgment does not, at least as against strangers to it, prove the antecedent existence of

the debt for which it was rendered. *Hartman v. Weiland*, 36 Minn. 223, 30 N. W. 815; *Bloom v. Moy*, supra, and cases cited.

Judgment reversed, and a new trial granted.

PHILIP H. KRAY v. ANTON MUGGLI and Others.

July 3, 1899.

Nos. 11,699—(204).

77	231
177	244

77	231
480	105

Removal of Dam—Prescriptive Right of Riparian Owners—Injunction.

A milldam was constructed across a small river in such a manner as to create a vast reservoir of water in the river, and in a chain of lakes through which the river runs, thereby flooding a large area of lowlands. After the dam was maintained for 41 years, and the mill owner had acquired a prescriptive right to maintain it, he sold to the owners of certain of the flooded lands the right to destroy the dam and reclaim their flooded lands. In an action brought by another riparian owner to enjoin the removal of the dam or the lowering of the stage of water thereby maintained, *held*, the dam being of a perishable character, and the mill owner being liable for negligence in maintaining it, if not an insurer of its safety as to all persons who may be injured by the bursting of the reservoir, the conditions continue always to be of an artificial character, the reservoir does not become, by lapse of time, analogous to a natural lake or water course, and the riparian owners have not acquired a reciprocal prescriptive right to have the dam maintained for their benefit after the mill owner has abandoned it for the purposes of water power.

77	231
84	90
84	91
84	98
84	94

Same—Equitable Estoppel.

Held, further, even in such a case, the riparian owners may, by equitable estoppel, acquire the right to maintain the dam or have it maintained, but in such a case their equities must be strong and substantial. In this case their equities are not of that character, and there are strong counter equities in defendants which defeat the claims of the plaintiff.

Action in the district court for Stearns county to enjoin defendants from removing a milldam. The case was tried before Searle, J., who found in favor of plaintiff; and from a judgment entered pursuant to the findings, defendants appealed. Reversed.

G. W. Stewart, for appellants.

Plaintiff did not possess and could not acquire any rights by pre-

scription. The dam owners are not estopped from removing the dam. The cases in which estoppel has been applied are cases where there was a change in the condition of the water course, which had been acquiesced in from its inception by all parties in interest, and where to permit the change would have been inequitable and destructive of valuable property rights. In none of these cases did the owner of the dominant estate seek to abandon the prescriptive right which he had in the waters. What he did seek was to change the manner of the user to the great loss of many and to little benefit to himself. Plaintiff's rights of navigation are not threatened. A stream that can be made floatable only by artificial means cannot be deemed a public highway. *Moore v. Sanborne*, 2 Mich. 520; *Rhodes v. Otis*, 33 Ala. 578; *Lewis v. Coffee*, 77 Ala. 190; *Cardwell v. County*, 79 Cal. 347; *Rowe v. Granite*, 21 Pick. 344; *Morgan v. King*, 35 N. Y. 454; *Haines v. Welch*, 14 Ore. 319; *Haines v. Hall*, 17 Ore. 165.

An easement exists only for the benefit of the dominant owner, and the servient owner acquires no right to its continuance. *Jones, Easem.* § 6; *Mason v. Shrewsbury*, L. R. 6 Q. B. 578; *Felton v. Simpson*, 33 N. C. 84; *Peter v. Caswell*, 38 Oh. St. 518; *Arkwright v. Gell*, 5 M. & W. 202; *Brace v. Yale*, 99 Mass. 488; *Smith v. Youmans*, 96 Wis. 103; *Canton Iron Co. v. Biwabik Bessemer Co.*, 63 Minn. 367.

Reynolds & Roeser and *Calhoun & Bennett*, for respondent Kray.

The contract under which defendants claim the right to remove the dam contemplates doing an act prohibited by law, and is void. *G. S.* 1894, §§ 6878, 6879; *Handy v. St. Paul Globe Pub. Co.*, 41 Minn. 188; *Buckley v. Humason*, 50 Minn. 195; *Bishop*, Cont. §§ 471, 547; 1 *Pomeroy*, Eq. Jur. § 402; *Sandage v. Studebaker*, 142 Ind. 148; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. R. 674, and note; *Miller v. Ammon*, 145 U. S. 421. While equity will not interfere to punish or prevent merely criminal or immoral acts unconnected with violation of private rights, equity will interfere if the acts are so connected. *In re Debs*, 158 U. S. 564, 593; *Cranford v. Tyrrell*, 128 N. Y. 341; *Port v. Louisville*, 84 Ala. 115.

Waters in a meandered lake of more than 160 acres, capable of beneficial use for fishing, fowling, boating, or for furnishing water

for domestic, municipal or agricultural purposes, are public and navigable waters. *Laws* 1897, c. 257, § 1; *Lamprey v. State*, 52 Minn. 181; *Miller v. Mendenhall*, 43 Minn. 95; *Minneapolis M. Co. v. Board of W. Commrs.*, 56 Minn. 485. Plaintiff will suffer a damage not common to the public by removal of the dam, and hence injunction will lie. *Page v. Mille Lacs L. Co.*, 53 Minn. 492; *Aldrich v. Wetmore*, 52 Minn. 164; *Potter v. Howe*, 141 Mass. 357; *French v. Connecticut*, 145 Mass. 261.

Where the natural flow of water has been diverted or collected by a permanent artificial dam into an artificial channel, and such condition has continued for more than 20 years, the riparian owners obtain a prescriptive right to have the water so remain, and the person who placed the obstruction and all persons claiming under him are estopped from restoring the water to its original state. *Beeston v. Weate*, 5 El. & B. 986; *Sutcliffe v. Booth*, 32 L. J. Q. B. 136; *Nuttall v. Bracewell*, 4 H. & C. 714; *Holker v. Poritt*, L. R. 8 Exch. 107, 10 Exch. 59; *Roberts v. Richards*, 50 L. J. Ch. 297; *Jones, Easem.* §§ 808-810; *Washburn, Easem.* § 47; *Gould, Waters*, §§ 159, 225, 340; *Woodbury v. Short*, 17 Vt. 387; *Ford v. Whitlock*, 27 Vt. 265; *Belknap v. Trimble*, 3 Paige, 577; *Shepardson v. Perkins*, 58 N. H. 354; *Delaney v. Boston*, 2 Har. (Del.) 489; *Mathewson v. Hoffman*, 77 Mich. 420; *Smith v. Youmans*, 96 Wis. 103; *Murchie v. Gates*, 78 Me. 300; *Canton Iron Co. v. Biwabik Bessemer Co.*, 63 Minn. 367; *Watkins v. Peck*, 13 N. H. 360; *Bullen v. Runnels*, 2 N. H. 255; *Flemings Appeal*, 65 Pa. St. 444; *Green v. Carotta*, 72 Cal. 267; *Adams v. Manning*, 48 Conn. 477; *Freeman v. Weeks*, 45 Mich. 335; *Weatherby v. Meiklejohn*, 56 Wis. 73; *Middleton v. Gregorie*, 2 Rich. L. (So. C.) 631, 638; *City v. Althouse*, 93 Pa. St. 400. Where a permanent obstruction has been placed in a natural water course, and the flow and level have been changed, and such change continues for more than 20 years, the same rights may be presumed in favor of riparian owners as if such artificial stream had been natural. See cases cited last above. Injunction is the proper remedy. 1 High, Inj. § 794; *Lyon v. McLaughlin*, 32 Vt. 423; *Jones, Easem.* § 879; *Angell, Waters*, § 444.

CANTY, J.

This is an appeal from a judgment enjoining the defendants from removing a milldam at Cold Springs, Stearns county, Minnesota. Plaintiff is a riparian owner, whose land is partly flooded by the water held back by the dam. Two other actions were also brought by other parties against these defendants, and permanent injunctions were awarded against them thereon. They appealed in those actions also, and the three appeals were argued at the same time.

The dam was built in 1856 across the Sauk river, a small stream. A few miles above the dam the river ran through a chain of lakes. At the point where the dam was constructed, it raised the water in the river $7\frac{1}{2}$ feet. The flowage caused by the dam extends up the river 16 miles, covering the chain of lakes, increasing the depth of water in them from $2\frac{1}{2}$ to 4 feet, and overflowing large tracts of lowland around the lakes and along the river. The dam was maintained at this height for more than 41 years. The head of water thus obtained was used first to operate a sawmill, and afterwards a flourmill, and it is conceded that the owner of the mill and dam had long since acquired a prescriptive right to maintain the dam and flood the land which was flooded thereby. In 1897 the defendant Muggli was the owner of the mill and dam, and he entered into a contract with the other defendants whereby, in consideration of \$5,000, he agreed to give them the right to remove the dam, and agreed that it should never be rebuilt. The \$5,000 was contributed by some 40 farmers (including said other defendants) who owned land overflowed by the dam. The money was paid to Muggli, and the other defendants were about to remove the dam when this action was commenced.

This plaintiff is the owner of 270 acres of land, a part of which borders on the flooded district, and a part is flooded by reason of the dam. The trial court finds that, two years before the commencement of this action, plaintiff purchased this land, the same being then wild and unoccupied; that he purchased the same relying on the stage of water that had been maintained by the dam for more than 40 years, and with the intent to make of the land a pleasure resort for boating, fishing, and other amusements, and immediately thereafter expended \$300 in improving it and fitting

it for these purposes; that, as a part of such plan, he and those associated with him constructed a steamboat on said water at the cost and of the reasonable value of \$900, and he built at Cold Springs a boat house at a cost of \$500, and purchased numerous row-boats, and placed them in the river. All of this was done relying on the then existing conditions, and believing that the dam, and the stage of water thereby created, would be permanently maintained. The steamboat can now make on the lakes and river a round trip of 40 miles. The court finds

“That there is no evidence in this action as to the amount of profit made by said plaintiff and his associates in and about the operation of the said steamboat.”

If the dam is removed, it will lower the water bordering on plaintiff's land from $2\frac{1}{2}$ to 4 feet, and destroy the value of these improvements for the purposes for which they were intended. Plaintiff also uses his land for pasturing stock, and the lowering of the water will require him to build some additional fence, but will also give him a considerable area of land which is now submerged. The court further finds

“That the waters in the flowage of said river were never used for the purposes for which they are used by plaintiff until the year 1895,” and “that the benefits which the said defendants and their associates will receive from the removal of said dam will be largely in excess of the damages thereby sustained by the plaintiff;”

and that the purpose of such removal is to reclaim said overflowed lands for agricultural purposes.

Respondent Kray contends that water rights obtained by prescription are reciprocal; that, when one party obtains by prescription the right to divert or change the water, the other parties affected thereby obtain at the same time the right to have it remain changed or diverted. The following authorities cited by respondent would seem to sustain him in his position: *Sutcliffe v. Booth*, 32 L. J. Q. B. 136; *Holker v. Poritt*, L. R. 8 Exch. 107; *Woodbury v. Short*, 17 Vt. 387; *Ford v. Whitlock*, 27 Vt. 265; *Shepardson v. Perkins*, 58 N. H. 354; *Delaney v. Boston*, 2 Har. (Del.) 489; *Mathewson v. Hoffman*, 77 Mich. 420, 43 N. W. 879; *Smith v. Youmans*, 96 Wis.

103, 70 N. W. 1115; *Weatherby v. Meiklejohn*, 56 Wis. 73, 13 N. W. 697; *Middleton v. Gregorie*, 2 Rich. L. (So. C.) 638.

It is rather difficult to see on what principle such a reciprocal prescriptive right can be sustained, and especially so in this case. Plaintiff's land was wild, and unoccupied by him and his grantors, during all the time in which the owners of the mill were acquiring their prescriptive right. How can the owner of wild and unoccupied land acquire therein a prescriptive right which he has never used and never even asserted? It was conceded by respondent on the argument that it is immaterial, for the purposes of this case, whether the mill owner acquired the easement of flowage by prescription or by grant. It is claimed that, in either case, a reciprocal right would be acquired by prescription after the right of flowage had been exercised by the mill owner continuously for the 20 years, at least, if the owner of the servient estate actually occupied his land during all that time. Friedman, the plaintiff in one of the other actions, did, before the commencement of that action, occupy his land for a sufficient length of time to acquire such a reciprocal prescriptive right, if it can be so acquired, and respondents contend that in that action, at least, the judgment should be affirmed.

The position so taken by the respondent and by the cases so cited amounts to this: Although nothing is done during the whole prescriptive period which is inconsistent with the rights of the party diverting or changing the water, or which will give him a cause of action, or which he can prevent, yet the owner of the servient estate will acquire by prescription a reciprocal easement. But we do not deem it necessary to decide whether such a reciprocal easement can be thus acquired. In all of these cases, except, perhaps, *Woodbury v. Short*, the equities were all on one side. Those equities were strong, and the result arrived at could have been sustained on the ground of equitable estoppel, which also was one of the grounds given in many of the cases. In each of the cases, the party had made valuable and substantial improvements relying on the apparently permanent character of the change or diversion, and there were no counter equities entitled to very much consideration. In our opinion, there are two elements in this case which distinguish it from nearly all of the cases so cited: (1) The presumably perish-

able character of the dam which holds back this vast reservoir of water; and (2) the strong counter equities of the defendants.

1. Whether or not this dam is of a perishable character is not disclosed by the findings, and the evidence is not returned. Such dams usually are of a perishable character. The burden was on the plaintiff to make out a case that will sustain an injunction, and, if the character of this dam is material, the burden was on him to show its character. We will therefore assume that the dam is perishable. When such a dam holds back such a vast volume of water, it is highly dangerous, and great and constant vigilance is necessary to keep the dam in repair, and of sufficient strength to hold back the water, and keep it from bursting away and causing destruction to life and property below the dam. Such a condition of things is highly artificial, and always continues to be so, and is not, as respondent insists, analogous to the conditions existing in a natural water course. As long as the mill owner uses his mill, and runs it by water power, he will keep up these artificial conditions. But it is not ordinarily fair to assume that he will keep them up longer. These defendants have purchased the rights of the mill owner, stand in his shoes, and now propose to abandon the use of the water for water power in connection with the mill. Have they, under the circumstances, a right to do so?

It is clearly the duty of the owner of such a dam, after he has abandoned the use of it for his own purposes, either to keep it in good and sufficient repair, or else tear it out in such a way as to release in a careful and proper manner the reservoir of water which it confines. He cannot, as respondent assumes, let nature take her course, and permit the dam to go gradually to decay. Then, if he cannot tear the dam out, he must keep it in sufficient repair. It might cost him \$1,000 a year to keep it in repair, and the total benefit to all the riparian owners resulting from the maintenance of the dam might not exceed \$10 per year; and yet, if respondent's position is correct, these riparian owners would have acquired a reciprocal prescriptive right by which they could compel the perpetual maintenance of this dam. And, even if it were held that they could enter upon his premises and make the repairs themselves, that would not relieve him from liability if the repairs were not properly

made, but he would still be liable for any damages resulting from maintaining a nuisance upon his premises. See *Simpson v. Stillwater Water Co.*, 62 Minn. 444, 446, 64 N. W. 1144. In fact, it is generally held that the owner of such a dam is, except in cases of vis major, an insurer of its safety as to all persons who may be injured by the bursting of it. See *Cahill v. Eastman*, 18 Minn. 292 (324); *Berger v. Minneapolis Gaslight Co.*, 60 Minn. 296, 62 N. W. 336, and cases cited. We must hold that, under these circumstances, the riparian owner cannot acquire a reciprocal prescriptive right to have the dam maintained, whether the mill owner acquired his right by prescription or by grant.

However, even in the case where a large reservoir of water is held back by a perishable dam, the riparian owner may, in our opinion, acquire, by equitable estoppel, the right to have the dam maintained at his own expense or at the expense of the owner thereof. But the equities which will give such a riparian owner such a right in such a case must be strong and substantial, and it does not appear that the equities of these plaintiffs are of this character. For all that appears, the burden or risk of maintaining this dam may be so great as to make it highly inequitable that the owners of it should be compelled to maintain it or permit it to be maintained for the benefit of a few of these riparian owners after it had ceased to be used for the purposes of water power.

2. But there is still another reason why the equities of the plaintiffs in these actions are neither strong nor substantial. The defendants have strong counter equities.

The principles which control the application of the doctrine of equitable estoppel are very equitable and flexible, and, in our opinion, such counter equities are entitled to due consideration. Otherwise, the plaintiff would prevail, even though the benefit to him from the maintenance of the dam might not be \$50, while the benefits to the defendants from the removal would exceed \$50,000. We need not determine whether the equities of any one not a party to this action should be considered in it, even if pleaded and proved. The equities of the plaintiffs in the other two actions were neither pleaded in this action nor found by the court. But all of these plaintiffs might have joined in one action (see *Grant v. Schmidt*, 22

Minn. 1, and 14 Enc. Pl. & Pr. 1108), and we will consider the case as though they had so joined. We have already stated what are the equities of the plaintiff in this action.

One Friedman brought one of the other actions. The river runs along one side of his farm, and, in its present high stage, furnishes a barrier on one side of his pasture. If the dam is removed, the water will be lowered in the river to such an extent that he will have to build a fence along that side of his pasture, and he will be "somewhat damaged and interfered with." The court further finds that it is entirely practicable and feasible to build this fence at comparatively small cost, and in such a manner that the stock in the pasture may still drink at the river.

The other action was brought by the town of Wakefield. Many years ago the town constructed a public bridge across the Sauk river just below the outlet of the lowest lake of said chain of lakes. In that action the trial court found as follows:

"That if the dam is removed, as threatened by the defendants herein, and the water in said millpond drawn out, a larger current may be created at a point where said pier is erected on the easterly side of said river, on said highway, and the foundation upon which rests said easterly pier may become undermined, in which event said bridge may be endangered, but such result may be avoided by carefully and properly drawing off the water from above the dam, or by protecting the piers of the bridge by riprapping, at a cost of not to exceed \$75."

Under these circumstances, the only relief to which the town is entitled is that the defendants should be enjoined from removing the dam, except in such a manner as to draw the water off in "a careful and proper manner." So far as appears, these are all the equities which can be urged by any one against the removal of this dam, and, in our opinion, they are not, under the circumstances, sufficiently strong or substantial to prevent its removal. In none of the cases above cited were the conditions similar to those here presented. True, in *Smith v. Youmans*, so much relied on by respondent, there was a large reservoir of water confined by a dam; but there were strong equities in favor of the riparian owners who sought to have the ordinary stage of water maintained by the dam, there were no counter equities entitled to any great amount of con-

sideration, and the mill owner did not seek to abandon his dam or his water power. He simply proceeded to use the water in an unusual and irregular manner, by drawing it out of the reservoir in large quantities, and lowering very greatly the stage of water, and then closing the gates, and permitting the reservoir to fill again. This created a constantly recurring nuisance, by periodically exposing the boggy and slimy bottom of the reservoir around the shore. We are of the opinion that the findings of fact will not support the conclusions of law or the judgment.

The judgment is reversed, and judgment for defendants is ordered on the findings.

COLLINS, J. (dissenting).

The consequences to be anticipated from the decision in this case are of such great importance, and in my judgment so disastrous, not only to the people of the locality directly affected, but also to those at other places in the state where water powers were created in the early days, which have since become useless, that I feel compelled to dissent.

The dam in question was built in 1856,—more than 40 years ago, and prior to the admission of this state into the Union in 1858, and prior to the making of the United States surveys in that section of the country,—and the waters in the stream and in the lakes through which it flowed were then raised to the height at which they now stand. When the surveys were made, in 1857, these lakes were treated as natural bodies of water, and the tracts of land bordering thereon were meandered, and the metes and bounds of the shore tracts established in accordance therewith. This was all shown upon the topographical map introduced in evidence. For more than 20 years the shores around these meandered bodies of water have been well defined on the new lines, so that no person unacquainted with the real facts would even suspect that the waters had ever been raised, or that the old original shores had been submerged. To all appearances, the artificial condition has always been the natural. All titles to these surrounding tracts of land were obtained by defendants or their grantors subsequent to these government surveys, and with reference thereto and to the then flooded

condition of the lands which they now propose to obtain by draining the lakes. Their rights are not those of persons whose real property has been submerged by a trespasser, but are simply those of riparian owners upon meandered bodies of water. Their equities are wholly subject to the fact that the waters were raised and the land overflowed while the government was owner, and before the defendants or their predecessors in interest had acquired any rights in or title to the shores.

The proposition of these defendants is to destroy the dam, and thus to draw down and lower the waters of these lakes from two to four feet below the levels at which they were when the surveys were made, and the lands bordering on the lakes meandered, and metes and bounds established. This proposition is the one which meets the approval of this court. To carry it out, an act which is forbidden by law must be performed; for, under the provisions of G. S. 1894, §§ 6878, 6879, it is made a misdemeanor for any person to drain, or attempt to drain, or cause to be drained, any body of water in this state which has been meandered by the government survey, and where metes and bounds have been established. That is exactly what these defendants claim they have the right to do, and what the court says they may do, under the contract. It seems to me that equities which, to be of any value, must be obtained through a violation of a penal statute, are not entitled to much weight when determining where the real equities are in this case. In the main opinion it is urged that there can be no reciprocal rights as between the parties, because nothing was done during the whole prescriptive period which was inconsistent with the rights of the party flooding the land. If there be any force in this argument, it follows that a riparian owner above the dam, who was satisfied with its construction, or who was, or at least thought he was, benefited, instead of injured by the flooding of his land, could obtain no rights by acquiescence. He would have to remain in uncertainty and doubt as to whether he had best object to the flooding, and seek compensation for an act which was not injurious in fact, or which he believed to be no injury, or he would have to remain silent, and take the chances of having nothing done in the

future which would prove a serious detriment to his property. I see no manner in which he could protect himself against future injury, except by making such improvements as would appear to a court to create greater equities in his favor than could be presented by his adversary.

It is assumed in the main opinion that the dam is of a perishable character, and may go out, causing great damage to property below, for which defendant Muggli would be held liable. This fact seems to have great weight with the majority. The dam has been in place 40 years, and I am of the opinion that it is hardly fair to the plaintiff to assume that it may give way, or, if it did, that loss and destruction of property would ensue. But, as I understand the theory on which the cases are decided in which the doctrine of reciprocal rights has been applied, it is that the artificial conditions which once existed have become the natural conditions. In other words, and briefly stated, what was once an artificial obstruction to the flow of a stream has, through lapse of time and the change it has wrought in the conditions, become a natural one. If this be so, the dangers which it is suggested lie in wait for defendant Muggli, should the obstruction be swept away and injury result to the riparian owners below, are not so great as anticipated.

Referring again to the doctrine of equitable estoppel, let me call attention to the fact that, if comparative benefits are to be considered, no one would be safe, for he would never know what might be the fact when it became necessary for him to invoke the aid of the doctrine. He might be safe in making improvements to-day, relying upon the conditions, and absolutely without protection to-morrow. I do not think that the doctrine of equitable estoppel is to be influenced by weighing the benefits as between the parties. But I will not discuss the questions further. The cases which are mentioned in the main opinion go into the subject of reciprocal rights and of equitable estoppel in cases of this character quite fully. See also *Village v. Savoy*, 103 Wis. 271, 79 N. W. 436, and *Priewe v. Wisconsin*, 103 Wis. 537. I am of the firm opinion that when the defendants propose to appropriate—not to reclaim—submerged land outside of the meander lines, to which they have no right or title except as owners of the meandered tracts, and in order to do

this must violate a criminal statute, they have no equities which should be allowed to outweigh and overcome those which have been presented by plaintiff and another riparian owner, who is plaintiff in one of the companion cases. I am opposed to the establishment of any rule which will countenance or permit the drainage and destruction of any of the splendid bodies of water with which the state is blessed, whether natural originally, or recognized as natural by the general government when causing surveys to be made, and thereafter so considered by the people, and which have become natural in fact, unless such rules are the inevitable result of careful research, based upon the clearest principles, and sustained by the undoubted weight of authority.

BUCK, J.

I agree with Justice COLLINS.

A petition for reargument having been presented in this case and in the two cases which follow next after, the following opinion was filed August 1, 1899:

START, C. J.

A petition for reargument herein having been duly made and considered, it is ordered that the petition be, and it is hereby, denied, and the stay heretofore entered herein vacated; but ordered, further, that the order heretofore entered herein, remanding the case to the district court, be modified so as to read as follows:

"Ordered, that a new trial be, and is hereby, granted in each of the cases, and that remittiturs be sent down accordingly."

JACOB FRIEDMAN v. ANTON MUGGLI and Others.

July 3, 1899.

Nos. 11,702—(206).

Appeal by defendants from a judgment of the district court for Stearns county, entered pursuant to the findings of Searle, J. Reversed.

G. W. Stewart, for appellants.

Calhoun & Bennett and *Reynolds & Roeser*, for respondent.

CANTY, J.

This cause is disposed of by *Kray v. Muggli*, supra, page 231. Judgment reversed, and judgment ordered for defendants on the findings of fact.¹

TOWN OF WAKEFIELD v. ANTON MUGGLI and Others.

July 3, 1899.

Nos. 11,701—(205).

Appeal by defendants from a judgment of the district court for Stearns county, entered pursuant to the findings of Searle, J. Reversed.

G. W. Stewart, for appellants.

Calhoun & Bennett and *Reynolds & Roeser*, for respondent.

CANTY, J.

This case is disposed of by *Kray v. Muggli*, supra, page 231. The case is remanded, with directions to the court below to modify the judgment so that it will merely restrain the defendants from removing the dam, except in such a careful and proper manner as not to endanger the abutments of the bridge in question.¹

¹ For modification of this order see the order which appears on page 243, supra.

E. E. HARRIOTT v. C. L. HOLMES. ,

July 12, 1899.

Nos. 11,572—(172).

77	245
81	215
77	245
82	460
77	245
88	287

Broker's Commission—Charge to Jury—Interest of Witness in Result.

Action to recover a broker's commission of \$390 for making a sale of real estate by plaintiff's assignor for the defendant. The trial court instructed the jury that, in weighing the testimony of the defendant, they had a right to take into consideration the great interest which he naturally felt in the result of the suit, and the strong temptation which he naturally felt to give evidence favorable to himself. *Held*, that the giving of the instruction was prejudicial error, in view of the particular circumstances of this case.

Action in the district court for Redwood county to recover the amount of a broker's commission. The case was tried before Webber, J., and a jury, which rendered a verdict in favor of plaintiff; and from an order denying a motion for a new trial, defendant appealed. *Reversed*.

D. A. Stuart, for appellant.

E. E. Harriott, pro se.

START, C. J.

Action by the plaintiff, as the assignee of O. L. Dornberg, to recover a broker's commission, in the sum of \$390, for making sale of certain real estate for the defendant. Verdict for the plaintiff for the amount claimed, and the defendant appealed from an order denying his motion for a new trial.

The allegations of the complaint are to the effect: That O. L. Dornberg and the defendant entered into a written contract whereby the latter employed and authorized the former to sell, and find a purchaser for, a tract of land owned by the defendant, containing 640 acres, on the following terms:

"\$22.00 an acre. Payments: \$2,500 down; \$1,500 Nov. 1, 1898; balance on equal payments, not to exceed two. The purchaser to assume the mortgage. Price and terms subject to change. Commission to remain the same. I agree to furnish a complete and merchantable abstract, and perfect title, with all taxes paid, and

agree to pay you five per cent. commission as soon as sale is made, or, if sold within the specified time, will accept \$13,376 net for same on the terms stated."

That Dornberg, pursuant to the contract, procured a purchaser for 400 acres of the land at the price of \$7,800, and that the defendant accepted his services in making such sale, and accepted and ratified the terms thereof, in writing. That by the terms of the contract the defendant promised to pay Dornberg for making such sale, as soon as made, a commission of five per cent. on the purchase price, which has not been paid, and that his claim therefor has been duly assigned to the plaintiff. The answer denied that Dornberg procured a purchaser for the land pursuant to the contract. It alleged that the signature of the defendant to the ratification of a proposed purchase and sale of a part of the land was procured by fraud. This was the important issue on the trial, and Dornberg, on behalf of the plaintiff, and the defendant, for himself, were the principal witnesses thereon. Their testimony was radically conflicting. The plaintiff was not called as a witness, as he necessarily was obliged to rely upon his assignor, Dornberg, to establish his cause of action.

The trial court instructed the jury that, in weighing the evidence of the different witnesses, the jury had a right to take into consideration the interest which any witness had in the result of the suit, if any such appeared, and then gave to them this further instruction:

"Under the laws of this state, the parties to a civil action have a right to be sworn as witnesses, and to give evidence in their own behalf, and one of the parties to this action has availed himself of this right, and has been sworn as a witness, and has given evidence in his own behalf; but, while the law makes this competent evidence, its weight is exclusively a question for the jury to determine, *and in weighing the evidence of the defendant the jury have a right to take into consideration the great interest which he naturally feels in the result of the suit, and the strong temptation which he naturally feels to give evidence favorable to himself*, and to give his evidence such weight, and only such weight, as the jury think it ought to receive. You, gentlemen of the jury, are the exclusive judges of all questions of fact, and of the credibility of each and every witness who has testified on the trial."

The defendant excepted to the giving of so much of this instruction as we have italicized, and assigns the giving of it as error.

In determining whether the giving of this instruction was prejudicial error, its context and the particular facts of this case must be considered. The court correctly charged the jury that they might take into consideration the interest of the witnesses in the result of the action; then the defendant is singled out, and the jury instructed particularly as to his credibility; but nothing was said as to Dornberg, who had covenanted with the plaintiff that the claim against the defendant was justly due, and who was directly interested in maintaining the action, and whose alleged fraud was the principal issue in the case. The plaintiff was not sworn as a witness, as he knew nothing personally as to the issues; and necessarily his right to recover rested upon the testimony of Dornberg, the real party in interest, which was contradicted by the defendant. The important question for the jury to determine was which of these witnesses was entitled to credit. Such being the case, the court, after calling attention to the fact that parties have a right to be sworn as witnesses, and that one of the parties to this action had availed himself of this right and given evidence in his own behalf, then instructs the jury that in weighing his testimony they have a right to take into consideration the great interest he naturally feels in the result of the suit, and the strong temptation he naturally feels to give evidence favorable to himself. The instruction assumes as a fact or legal inference that, because there was \$390 involved in the result of the action, the defendant naturally felt a great interest in the result, and a strong temptation to give evidence favorable to himself. If such was the fact as to the defendant, what of Dornberg, who had not only the same pecuniary interest in the result of the action, but the further interest of vindicating himself from the charge of fraud made against him?

The giving of the instruction complained of was prejudicial error, as applied to the particular facts of this case, because it singled out the defendant, in violation of the rule that the trial court must not charge as to the credibility of particular witnesses of the same class. The instruction did not leave the defendant and the witness Dornberg before the jury on equal terms. It also invaded the prov-

ince of the jury, in assuming that the defendant naturally felt a strong temptation to give testimony favorable to himself. The vice in the instruction was not cured by the general charge that the jury were the exclusive judges of all questions of fact and the credibility of the witnesses. We hold that it was prejudicial error to give the instruction. It follows that there must be a new trial of this action, because of error in giving the instruction complained of.

It is proper, with reference to such trial, to dispose of the question raised by the defendant, that the complaint does not state a cause of action. The complaint shows upon its face that the plaintiff's assignor procured a purchaser, pursuant to the contract, for a portion of the real estate he was authorized to sell, before there was any revocation of his authority to sell, and that the defendant ratified the change in the terms of the sale as to quantity and price. The rate of commission remained the same. The complaint states a cause of action. *Hewitt v. Brown*, 21 Minn. 163; *Vaughan v. McCarthy*, 59 Minn. 199, 60 N. W. 1075.

Order reversed, and a new trial granted.

**STATE ex rel. CAROLINE GOTZIAN and Others v. DISTRICT COURT OF
RAMSEY COUNTY and Another.**

July 12, 1899.

Nos. 11,661—(29).

City of St. Paul—Eminent Domain—Land Owned by City.

The board of public works of the city of St. Paul is (the city not objecting) authorized by the city charter to condemn, for a public street or alley, land owned by the city, and to award damages to it for such taking, and to assess the benefits of the improvement, precisely as if the city were a private owner of the property taken.

Board of Public Works—Reassessment.

Such board is authorized by the city charter to make a reassessment of property benefited by a public improvement whenever the original is set aside for any cause, although it was set aside only as to a single lot, on the sole objection of its owner, and the other lot owners have paid the

original assessment, provided that the aggregate sum assessed against any lot does not exceed its proportional share of the benefits.

Same—Constitution.

The charter provisions authorizing such a reassessment are constitutional.

Same—Reassessment—Proportionate Benefit.

The finding of the trial court to the effect that the reassessment against the land of the relators was not demonstrably in excess of its proportional share of the benefits is sustained by the evidence.

Certiorari from the supreme court to the district court for Ramsey county and the Honorable William Louis Kelly, one of the judges thereof, to review a judgment of said court in the matter of a reassessment for opening an alley. Affirmed.

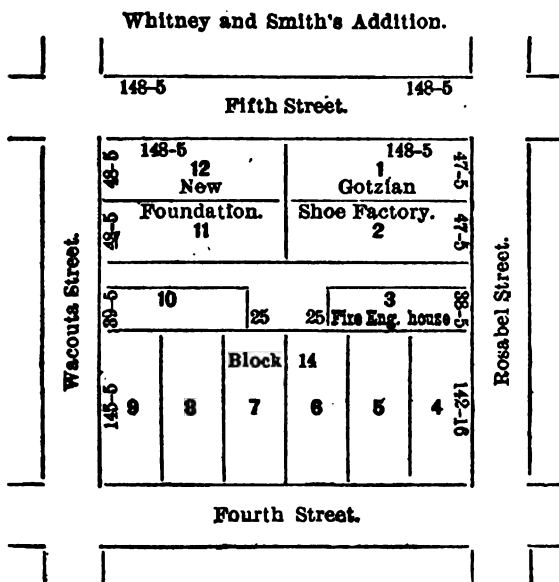
Ambrose Tighe, for relators Gotzian and Freeman.

H. J. & A. E. Horn, for relator Hennessy.

James E. Markham and *Franklin H. Griggs*, for respondents.

START, C. J.

Certiorari to review a judgment of the district court for the county of Ramsey in the matter of a reassessment for opening an alley through block 14 of Whitney & Smith's addition to the city of St. Paul. The city of St. Paul began proceedings for the opening of the alley in 1892, and in making the improvement the north 9 feet and the rear 25 feet of lot 3 and the north 9 feet and the rear 25 feet of lot 10 in the block were condemned. The alley, as opened, and its relation to the lots in the block, are shown by the following diagram:



Lot 10 was owned by private parties, and lot 3 by the city in its proprietary capacity, and it had located upon the part of the lot not taken for the alley one of the engine houses of its fire department. The sum of \$5,000 was awarded by the board of public works as damages to each of the owners of lots 3 and 10, which, with the incidental expenses, made the total cost of the improvement the sum of \$10,198.30. To cover this cost, the board of public works of the city levied an assessment of \$1,700 each on the lots benefited by the improvement, viz, lots 2, 3, 6, 7, 10, and 11. The relators Gotzian and Freeman, the owners of lot 2, paid the assessment before it became delinquent; so did the owners of lots 7 and 11; while the assessments on 3 and 10 were set off against the damages awarded for the part condemned, leaving \$3,300 due to the owner of each of them. From the \$5,100 paid by lots 2, 7, and 11, \$3,300 was paid to the owner of lot 10, in full discharge of the balance of his damages, and the residue, \$1,800, was paid to the city, as the owner of lot 3, in part payment of the balance of its damages.

The relator Hennessy, the owner of lot 6, alone refused to pay his assessment; and, having filed objections to it in the district court,

they were sustained on the ground that the board of public works had acted without jurisdiction. He also successfully contested a subsequent reassessment, in the sum of \$1,700, of lot 6, for benefits accruing to it on account of the improvement, on the ground that it was in excess of its proportional part of the cost of the improvement. Thereupon the board of public works in June, 1898, made a second reassessment to make up the deficiency. It assessed \$849.79 thereof against lot 6, which had thus far paid nothing, and \$424.26 each on lots 2 and 11; making, with the original assessment already paid, an assessment of \$2,124.26 against each of them. The owners of lots 2 and 6 filed separate objections to the reassessment in the district court. The objections were overruled as to each, and judgment entered accordingly.

1. All of the objections of the relator Hennessy to the reassessment in question meriting consideration are to the effect that lot 3, owned by the city of St. Paul, was already devoted to a public purpose, therefore the city had no power to condemn any portion of it for any other public purpose; hence, the board of public works had no authority to assess benefits upon other property for the payment of damages awarded to the city for the actual taking of a part of lot 3 for the proposed improvement. Or, in other words, the real question, so far as the relator Hennessy is concerned, is, did the board of public works of the city have the power to condemn the part of lot 3 taken for the alley in question?

It is conceded that the city owns lot 3 in fee, and not in trust for any particular public purpose. It therefore owns the lot in its proprietary capacity, and it may dispose of it as it sees fit. The object of the proceedings in question was to change the absolute title of the city to the part of the lot taken for the alley to one in trust for a special public use, which use specially benefited the lot owners abutting on the alley. Or, in other words, the proceedings were a taking of the property of the city, which it held as proprietor, and in which all the taxpayers of the city were directly interested, to devote it to a limited public use, for the special benefit of private landowners. As to the latter, the city must be regarded as a private owner of the lot, and entitled to damages for its taking for the specific public purpose equally with themselves. In no

other way can justice be done to the general taxpayers. If the city consents that its private property may be taken for such public use, it cannot equitably do so except upon condition that compensation be made to it for such taking in the same manner as to private owners. The city is not contesting the taking in this case, but it is simply insisting, for the benefit of the general taxpayers, that, as between it and the private landowners specially benefited by the taking, it shall be treated as a private owner. It necessarily follows that the rule invoked by the relators, to the effect that a general statutory power to condemn property for public use does not imply power to take property already devoted to a public use, has little, if any, application to this particular case.

We are, then, to inquire, in the light of the foregoing suggestions, whether the city of St. Paul was authorized by its charter to condemn, by its board of public works, the land in question, for a public use, and award damages to itself for the taking. The answer to the question depends on the construction to be given to the following provisions of the city charter:

"The city of St. Paul shall have the power to take private property for public use upon just compensation therefor being first paid or secured, such power shall be exercised through its common council or board of public works, or both, or other officers of said city, as provided in this act, or as may be hereafter provided by law." Municipal Code St. Paul, 375, § 17 (Sp. Laws 1874, c. 1, subc. 12, § 17).

"The municipal corporation of the city of St. Paul is hereby authorized and empowered to condemn land for * * * opening * * * any street * * * alley * * * and to condemn an easement in land across, over or under the property of corporations, * * * and to levy assessments for * * * the improvements * * * upon property fronting upon such improvement or upon the property to be benefited by such improvements." Municipal Code St. Paul, 98, § 95 (Sp. Laws 1889, c. 32, subc. 7, tit. 1, § 1).

The relators claim that these charter provisions authorize the taking only of private property for public use, but as between them and the city, representing the general taxpayer, the lot in question is private property. The proposition that a municipal corporation may, with the consent of the state, acquire and hold property in its

proprietary capacity (that is, acquire rights therein similar to those of private owners of property) is fully sustained on principle and by authority. The second provision of the charter which we have quoted authorizes, by necessary implication, if not expressly, the board of public works to condemn the land here in question. Authority to condemn private property is given in general terms by the first provision quoted, then, by the second-quoted provision, for the purpose of making it perfectly clear that the power extends to the property of corporations, whether devoted to a public purpose or not, express authority is given to condemn an easement in such property for the opening of streets and alleys. The word "corporation," as used in the charter, includes municipal corporations.

We therefore hold that the board of public works of the city of St. Paul is (the city not objecting) authorized by the city charter to condemn, for a public street or alley, land owned by the city, and to award damages to it for such taking, and to assess the benefits of the improvement, precisely as if the city were a private owner of the property taken.

2. The relators Gotzian and Freeman claim that the board of public works had no authority to reassess a lot which had paid its original assessment, to meet a deficiency in the cost of an improvement, which was caused by the fact that another lot benefited had defeated in part the assessment originally imposed on it. This is true, if the original assessment paid was the full proportionate share of the lot paying the assessment of the benefits conferred by the improvement on the lots benefited; otherwise, not.

Before this improvement was decided upon, it was necessary for both the board of public works and the common council to determine that it was necessary and proper, and that property could be found benefited to the extent of the damage, cost, and expenses necessary to be incurred thereby. Municipal Code, St. Paul, 101 (Sp. Laws 1891, c. 6, § 4, as amended by Sp. Laws 1891, c. 7, § 2). It must therefore be assumed that the benefits to property benefited by this improvement were prima facie equal at least to the amount of the damages awarded for the taking of the land for the improvement, and the cost and expenses thereof. Now, when the district court, on the objection of the relator Hennessy, set aside the as-

assessment on his lot on the ground that it was demonstrably greatly in excess of its proportional share of the benefits, it necessarily followed that prima facie one or more of the other lots had been assessed for less than their proportional share of the benefits. This finding, however, was not *res adjudicata* as to the other lot owners; nor was it so in favor of Hennessy, except to the extent that the assessment of \$1,700 against his lot was excessive. To what extent it was excessive was left an open question. When the matter went back to the board of public works, it was not simply to readjust the assessment on lot 6 and reduce it to its proportionate share of the benefits, but for a reconsideration of the entire assessments for benefits. If, on such reconsideration, the board had found that lots other than lot 6 had been assessed for their full proportionate share of the benefits, then it could not add anything to their assessment, and lot 6 could only be assessed for the amount of its share of the benefits, although it might leave a deficiency.

The board, in the absence of anything in the record to the contrary, is presumed to have done its duty, and to have taken into consideration on the reassessment all of the lots benefited, and not simply lots 2, 6, and 11, and to have found that all of the lots except those named were originally assessed for and had paid the full amount of their proportional share of the benefits, but that such was not the case with lots 2 and 11, and that they should be assessed, in addition to the amount already paid, such further sum as would, in the aggregate, equal their proportionate share of the benefits. If the aggregate assessment against lots 2 and 11 is no more than their fair proportionate share of the benefits, their owners have no legal cause for complaint because lot 7 may have been assessed for more than its share of the benefits, and lot 6 for less. We are of the opinion that the board of public works had authority to make the second reassessment by virtue of the following provisions of the city charter:

"In all cases where * * * judgment has heretofore been refused or denied by the court, or the assessment, or any part thereof, as to any lot, lots or parcels of land, * * * for any cause whatever, has been * * * set aside or declared void by any court, the Board of Public Works shall, upon notice thereof by the city

treasurer, proceed without unnecessary delay to make a reassessment or new assessment upon all lots, blocks and parcels of land which have been or will be benefited by such improvement, to the extent of their proportionate part of the cost and expenses thereof, * * * and when the same shall have been made and confirmed by said board, it shall be enforced and collected in the same manner that other assessments are enforced and collected under this act. * * * And in all cases where judgment has been * * * denied by any court, or where any court, * * * shall set aside or declare void any assessment upon any lot or parcel of land, for any cause, the said lots or parcels of land may be reassessed or newly assessed, from time to time, until each separate lot, piece or parcel of land has paid its proportionate part of the costs and expenses of said improvements, as near as may be, to the benefits derived, or to be derived from such improvement. In case the amount of such reassessment shall be less than the first assessment upon the lots and parcels of land reassessed, the deficit shall be paid out of the local improvement fund." Municipal Code St. Paul, 139, § 59 (Sp. Laws 1887, c. 7, subc. 1, tit. 1, § 60).

When all of these provisions are considered together, their meaning is reasonably clear. They authorize a new assessment or reassessment of property benefited by a public improvement whenever and as often as any assessment is set aside for any cause by the court upon any lot or lots or parcels of land. If the assessment is set aside as to one lot only, all of the lots benefited may be reassessed, provided that the aggregate sum so assessed against any lot does not exceed its proportionate share of the benefits.

Counsel for relators Gotzian and Freeman also claim that this construction of the charter provisions renders them unconstitutional, because, where the assessment is set aside on the objection of a single lot owner, as to his property alone, the other property owners affected by the reassessment have no opportunity to be heard as to the necessity for such reassessment. But, as already suggested, the action of the court in setting the assessment aside is not *res adjudicata* as to them, and, when application is made for judgment on the reassessment, notice must be given to them, and they may appear and show that the original assessment was correct as to them, in that they were assessed for their full proportionate share of the benefits. The objections of counsel as to the reassessment apply to the original assessment with equal force, for

the same notice, and none other, is required in each case. If the charter is unconstitutional as to the one, it is as to the other. It is constitutional as to both, for it provides for notice to the lot owners of a time and place when and where they may be heard before judgment is taken against them.

The trial court, by its order and judgment herein, necessarily found that the aggregate assessment against the lot owned by the relators Gotzian and Freeman was not demonstrably in excess of their proportional share of the benefits of the improvement. The finding is sustained by the evidence.

Judgment affirmed.

BENJAMIN F. LANGWORTHY v. C. C. WASHBURN FLOURING MILLS COMPANY.

July 12, 1899.

Nos. 11,692—(201).

Fire Insurance—Flour Mill.

A mutual insurance company was authorized by its charter to insure "dwelling houses, household furniture, farm buildings, and other property against loss or damage by fire." It issued its policies to the defendant on its flour mills in consideration of its premium notes. This is an action to collect the amount of an assessment on the notes. *Held*, that the policies were valid, and, the defendant having had the benefit of the insurance contract, it is liable on its notes.

Findings Sustained by Evidence.

Held, that the evidence sustains the findings of the trial court to the effect (a) that the insurance company was authorized to do business in this state; (b) that the premium notes were given for a valuable consideration, and were not obtained by fraud or false representations; (c) that the defendant's liability for losses occurring during the life of its policies was not settled and terminated when it surrendered them; (d) that the defendant (except as to one item) was assessed only for its pro rata share of the losses incurred during the period of its membership.

Premium Note—Assessment for Receivership.

An assessment, on premium notes to a mutual insurance company,

made after the company has become insolvent, and a receiver has been appointed, may properly include the expenses of winding up its affairs.

Statute of Limitations.

Held, following *Langworthy v. Garding*, 74 Minn. 325, that this action is not barred by the statute of limitations or by laches.

Action in the district court for Hennepin county by plaintiff, as receiver of the Mutual Fire Insurance Company of Chicago, to recover \$906.91 and interest on premium notes. The case was tried before Elliott, J., who found in favor of plaintiff; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

Warner, Richardson & Lawrence, for appellant.

C. W. Greenfield and Wicks, Paige & Lamb, for respondent.

START, C. J.

This action was brought by the plaintiff, as receiver of the Mutual Fire Insurance Company of Chicago, to recover from the defendant an assessment made on its premium notes to the company by a decree of the circuit court of the county of Cook, Illinois. The insurance company about August 1, 1889, issued to the defendant two policies of insurance on its property, in consideration of two premium notes executed by the defendant to the insurance company, in the aggregate amount of \$4,250, payable, by instalments, at such time as the directors of the company might order and assess for the losses and expenses of the company. The answer admits the execution of the premium notes and policies, but alleges several affirmative defenses to this action, which are hereinafter referred to in detail. The trial court made its findings of fact, and, as a conclusion of law, directed judgment for the plaintiff for the amount claimed, and the defendant appealed from an order denying its motion for a new trial.

1. The policies in question purported to insure the defendant against loss or damage by fire to its flour mills, and its first defense was that the insurance company had no power to insure such property; hence it was not liable on its premium notes. The trial court found that it had such power, and the defendant assigns the ruling as error.

The insurance company was organized, under a statute of the state of Illinois,

"For the purpose of insuring dwelling houses, household furniture, farm buildings, and other property against loss or damage by fire."

The defendant's contention is that the words, "and other property," must be limited to other property of the same character as that specified; hence they do not include mills of any kind. This provision of the charter of the insurance company was construed in the case of *Thompson v. Mutual*, 66 Ill. App. 254, and it was held that the company might lawfully insure mills. The claim of the defendant that this construction of the charter of the company is not binding on the courts of this state, because not pleaded, and because the decision was not given by the highest court of the state of Illinois, may be conceded, without so deciding. The construction to be given to the charter provisions in question is not entirely clear. It is certain, however, that some meaning must be given to the words "and other property," and the rule of *ejusdem generis* must not be applied so strictly as practically to eliminate them. The company manifestly had power to insure other property, as well as dwelling houses and farm buildings. The officers having issued policies on such other property, they were enforceable against the company, for such act was not manifestly in excess of the powers of the corporation. The officers might, in perfect good faith, have construed its charter as authorizing the insurance of mills. The policies were therefore valid as to the assured, who had accepted them, and given premium notes therefor, in good faith, whatever construction might be given to the charter of the insurance company if its power to insure such property was directly challenged by the state. The defendant having had the benefit of the insurance contract, and the company having borne its burden, each is now estopped to question its validity. *Auerbach v. Le Sueur Mill Co.*, 28 Minn. 291, 9 N. W. 799; *Columbia Electric Co. v. Dixon*, 46 Minn. 463, 49 N. W. 244; *American T. & S. Bank v. Gluck*, 68 Minn. 129, 70 N. W. 1085. The trial court correctly overruled the defendant's first defense.

In reaching this conclusion, we have not overlooked the case of

Rochester Ins. Co. v. Martin, 13 Minn. 54 (59), cited and relied on by the defendant. The facts of that case were that the plaintiff was organized and authorized to do business only as a fire insurance company. It issued a policy to the defendant, purporting to insure his live stock against accident and disease resulting in death. The note sued on was given for such a policy. The defendant answered to the effect that the sole consideration for the note was the issuing of the policy, and alleged fraud in fact in obtaining the note. The plaintiff demurred to the answer, and it was held by this court that the answer stated a defense, for the reason, as stated by the court, that

"The defendant alleges that he was induced to enter into the contract by the false and fraudulent representations of the plaintiff's agent, and that he did not discover the fraud until after the commencement of this action. Under these circumstances he is justified in law and morals in repudiating the contract. He has received no consideration except the promise which the plaintiff's agent had no right to make, and which the defendant could not enforce."

The distinction between the two cases is obvious, and the one cited is not here in point.

2. The second defense interposed was to the effect that the insurance company did not comply with the provisions of our statutes, so as to be authorized to do business in this state. The trial court found that it had, and the defendant assigns the finding as error, on the ground that it was not justified by the evidence.

The burden of showing noncompliance with the statute by the company was upon the defendant. *Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207. The evidence warrants the conclusion that the insurance commissioner of this state issued to the company each year it was doing business in this state a license or certificate of authority to do business as required by law. Whether the evidence offered by the defendant was sufficient to overcome the presumption arising from the act of the insurance commissioner was fairly a question of fact for the trial court. The finding complained of is sustained by the evidence.

3. The third and fourth defenses may be considered together.

They are to the effect that the premium notes were without consideration, and so void, by virtue of G. S. 1894, § 3173, and that they were obtained by false representation and deceit.

The statute referred to is to the effect that if any insurance company doing business in this state falsely represents or holds out to the public, by means of any advertisement, circular, notice, or statement, published or circulated through the agency of any officer, agent, or other person, or by any other means, that the capital stock of such company is greater than its actual amount, or that its accumulation is greater than its value, all money or obligations thereafter received for insurance shall be deemed to have been taken without consideration. This statute is penal in its nature, and must be strictly construed. The representation must not only be erroneous and published, but it must be knowingly false. It is difficult to see how this statute can apply to a mutual insurance company which has no capital stock, and where there is no liability on the premium notes except for actual losses during the time the makers are enjoying indemnity against loss by virtue of the policies for which the notes were given. The real consideration for the notes does not accrue, it would seem, at the time they are made, but from time to time, as the insured enjoys indemnity against loss. However this may be, we are of the opinion that the evidence is not sufficient to bring this case within the statute.

The trial court found as a fact that neither the insurance company, nor any of its officers or agents, were guilty of any fraud in obtaining the premium notes in question or procuring the acceptance of the policies by the defendant. The defendant claims this finding was error, and that, under the evidence, the court ought to have affirmatively found that the notes were obtained by fraud.

The evidence as to the alleged misrepresentations, briefly stated, is this: Mr. Bailey, the secretary of the defendant company, testified that Mr. Smith, the secretary of the insurance company, gave to him a statement of the financial condition of the insurance company as of December 31, 1888, and stated that it was a copy of the statement filed with the insurance commissioner of this state; that he compared it with the statement so filed, and found that the two statements were alike; thereupon, and in reliance upon the state-

ment, he gave the premium notes and accepted the policies for the defendant. The statement was as follows:

Assets.	
Total cash assets.....	\$141,881 83
Deposit notes	450,640 62
Total	\$592,522 45
Liabilities.	
Unpaid losses	\$ 40,256 25
Reserve for reinsurance on mutual policies	\$40,693 29
Reserve for reinsurance on cash policies	44,460 00
	<u>85,153 29</u>
	\$125,409 54
Surplus as to policy holders.....	\$467,112 91
Net cash surplus.....	\$ 16,472 15

Mr. Smith, the secretary of the company, testified that at this time there had been paid to it advanced premiums in the sum of \$52,000, for which its certificates of indebtedness had been issued, pursuant to the by-laws of the company. The defendant claims that these certificates constituted a liability, and that they did not appear in the statement; hence it was false and fraudulent. The by-laws of the company, under which the advance premiums were paid and the certificates therefor issued, provided that all money paid as advanced premiums should be held liable for the losses and expenses of the company, and that the persons making such advances should be held as members of the company, and share in the profits of the business; and, further, that the fund should not be divided among the members, except that, whenever the company should be dissolved, whatever remained of the fund, after the payment of all its liabilities of every kind, including outstanding certificates, should be distributed to the members,

“Pro rata, share and share alike, according to the amounts by them respectively paid for premiums of insurance on their policies or certificates then in force.”

The certificates on their face recited that the company had received from the holder thereof the amount therein stated,

"In advance, for premiums of insurance, which amount and every part thereof is liable for the expenses and losses of the company, and until the redemption of this receipt shall bear interest at the rate of 7 per cent. per annum, * * * and the company is hereby obligated to accept this receipt at par when presented in payment for premiums of insurance accepted or on account thereof."

It is clear, from the provisions of the by-laws, that these certificates were not a liability of the company as against creditors, including the policy holders, as the advance premium, as represented by the certificates, was liable for the losses of the company, and none of it was subject to distribution until all liabilities were paid. The obligation of the company to accept the certificates, if presented in payment for future insurance, was, at least, a contingent liability against the company. The evidence shows that the board of directors of the company did redeem these certificates during the year 1890. Whether the amount of the advance premium as represented by the outstanding certificate was taken into account in making the statement in question, is left in some doubt by the evidence. Mr. Smith was the only witness on the subject. He testified that

"The advance premiums were on the books the same as all premium receipts, and I assume in those statements they would appear as a part of the reinsurance reserve. * * * I said it did not appear, unless it did in the reinsurance reserve. If it were figured at the half, it would probably appear in the cash reinsurance reserve. Q. Well, was it figured in either one of those reserve insurances? A. I could not tell you that, I should judge not, at that time."

The record shows that in December, 1889, the company made a special assessment of 10 per cent. on its premium notes. Thereupon Mr. Bailey, who seems to have been entirely familiar with insurance matters, went to Chicago for the express purpose of investigating the affairs of the company, and did so. He testified that the officers exhibited to him all the books and records that he asked to see, that he then knew all the books that were necessary to show the affairs of a mutual insurance company, and that he there found all the

books necessary properly to conduct the business of the company, but he was not shown the books in which the advance premium account was kept, and he was not informed in any way concerning such advance premiums. On the strength of his investigation, the defendant paid the assessment, and retained its policies, until March 28, 1890, when it surrendered them, and they were cancelled, and the company returned to it \$120, unearned premium, pursuant to the provisions of the policies.

The defendant having retained its policies and received the benefit of the indemnity until it surrendered them, and until the rights of third parties, its fellow members, had accrued, it is, at least, doubtful whether it can now, when called upon by their representative, the receiver, to contribute its pro rata share for the payment of losses occurring while its policies were in force, avail itself of the defense that the premium notes were obtained by fraud, even if it has established the alleged fraud. The transaction was, at most, voidable, at its election. See *Dunn v. State Bank*, 59 Minn. 221, 61 N. W. 27; *Olson v. State Bank*, 67 Minn. 267, 69 N. W. 904; *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 381; *Wyman v. Gillett*, 54 Minn. 536, 56 N. W. 167; *Dettra v. Kestner*, 147 Pa. St. 566, 23 Atl. 889. However this may be, the burden was upon the defendant to establish, by clear and satisfactory evidence, its alleged defense, and, upon the whole evidence, we are of the opinion that the finding of the trial court, that neither the company nor any of its officers were guilty of fraud in obtaining the premium notes and procuring the acceptance of the policies by the defendant, is not so manifestly against the weight of the evidence as to justify us in setting the finding aside. It is sustained by the evidence.

4. The next defense relied on is that the defendant's liability to assessment for losses occurring during the time its policies were in force was absolutely terminated when the policies and premium notes were surrendered, on March 28, 1890. The policies contained a provision to the effect that they might be surrendered and cancelled at any time by the insured upon certain conditions, but they also contained this provision:

"All contingent liability of the insured shall cease and deter-

mine upon the termination of this policy from any cause so far as regards losses and expenses incurred subsequent to such termination, but the liability as regards prior losses and expenses shall not terminate until all the assessments levied against it are paid in full."

If the policies were cancelled pursuant to the provisions therein contained, the defendant, by virtue of the provisions we have quoted, remained liable to assessment for losses incurred during the time it was a member of the company. *Swing v. H. C. Akeley Lumber Co.*, 62 Minn. 169, 64 N. W. 97. This proposition is not seriously controverted by the defendant, but it insists that the transaction was not a cancellation under the terms of the policies, but that it was a settlement between the parties,—“a jumping of claims, and a compromise of claims, on both sides.” The evidence does not sustain this contention. On the contrary, it is sufficient to support the contention of the plaintiff that the cancellation was by virtue of the terms of the policies.

5. The defendant, while conceding the propriety and necessity for making the assessment and the amount that must be raised thereby, insists that it was made upon a wrong basis, in that it ignored the amount of premium notes outstanding at the date of any particular loss; and, further, that it is assessed for losses and liabilities not incurred during the life of its policies.

The plaintiff contends, on the authority of *Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207, that the assessment cannot be collaterally attacked by the defendant, on the ground that an error has been made in the computation of the assessment against it, for the reason that, if each member was allowed to defend on that ground when separately sued, different courts might hold differently on the same question, which would result in an unequal distribution of the burden of paying the losses. We do not understand the case cited to go to the extent of holding that if the assessment is made upon a principle or basis not authorized by the terms of the charter of the company and the policies, and which produces inequality between the different members (which seems to be the claim of the defendant), a member, when sued separately, may not attack the assessment on this ground.

Be this as it may, we find it unnecessary to discuss and decide the disputed question as to the limitation to be placed upon collateral attacks upon assessments made by a decree of court; for, with a single exception, there is no warrant in the record for the claims made by the defendant. The exception was an item of \$10,000 for losses incurred by the company, July 31, 1889, which was included in the amount of losses for the payment of which the defendant was assessed. Its policies, although dated July 27, did not go into effect until August 1. Hence it was admitted error to so include the \$10,000 item. The error, however, was not discovered until after the trial court had made its findings, when the plaintiff made a motion to have the findings and conclusions of law modified so as to reduce the amount of the plaintiff's recovery by a sum equal to the amount included in the assessment on account of such prior losses. The ascertainment of such sum was a mere matter of computation, based on data shown by the record. The difference would be about \$100. The defendant opposed the motion, and it was denied. The plaintiff offers in this court to remit the excess occasioned by such error. It would be manifestly unfair to reverse this case because of such error, for the opportunity to have it corrected in the district court was not only tendered to the defendant, but the plaintiff did all in his power to secure the correction, which presumably would have been made if the defendant had not objected to the granting of the motion. Therefore it has waived its right to insist on the error in this court.

The defendant further objects to the assessment because \$25,000, the estimated cost of administering the estate, was included as a liability. The payment of the expenses of the company, as well as its losses, was secured by the premium notes; and it was just as necessary to raise a fund by assessment to pay the necessary expenses of closing up the affairs of the company as it was to secure a fund with which to pay its losses, and it was proper to include such expenses in the assessment. *Davis v. Shearer*, 90 Wis. 250, 62 N. W. 1050. The defendant was assessed for its pro rata share of the expenses only.

It is also claimed on behalf of the defendant that a liability amounting to \$20,000, for unearned premiums, was included in the

assessment against it. Such a liability accrued on the failure and assignment of the company, and had no existence when the defendant, on March 28, 1890, ceased to be a member as to future losses and liabilities. But it appears from the record that this item was not included in the amount of the liabilities for which the defendant was assessed. It was only included in the liabilities of members whose policies were in force when the company failed, and the defendant was not assessed for any part of it.

Except as we have stated, the evidence does not justify the conclusion that the defendant's assessment was for any greater sum than its fair pro rata share of the expenses and losses that were incurred during the period of its membership.

6. The last claim of the defendant is that this action is barred by the statute of limitations and by laches. The cause of action did not accrue until the assessment was made, which was on July 3, 1891. The receiver made demand on the defendant for payment of its assessment promptly after it was made. Payment was refused, and this action was commenced December 22, 1896. The action is not barred, either by the statute or by the laches of the plaintiff. *Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207.

Order affirmed.

STATE v. CHARLES F. JOHNSON and Another.

July 12, 1899.

Nos. 11,705—(20).

Grand Larceny.

The defendant was convicted under the provisions of G. S. 1894, § 6711, making the obtaining, with intent to defraud, the property of another by aid of a worthless check, larceny. *Held*,

Same—Passing Bank Check.

That in giving a check or draft a party does not necessarily represent that he then has with the drawee funds out of which it will be paid, but he does represent by the act of passing it that it is a valid order for its amount, and that the existing state of facts is such that it will be paid in the ordinary course of business.

Verdict Not Sustained by Evidence.

That the verdict of guilty in this case is not sustained by the evidence.

John S. Lord and Charles F. Johnson were indicted in the district court for Le Sueur county for grand larceny in the second degree. The case was tried before Cadwell, J., and a jury, which rendered a verdict of guilty against defendant Johnson, the indictment having been dismissed against defendant Lord. From an order denying a motion for a new trial, defendant Johnson appealed. *Reversed*.

A. A. Stone and Smith & Parsons, for appellant.

W. B. Douglas, Attorney General, and *C. W. Somerby*, Assistant Attorney General, for the State.

START, C. J.

The defendant was convicted of the crime of grand larceny in the second degree in the district court of the county of Le Sueur, and appealed from an order denying his motion for a new trial. The indictment is based upon G. S. 1894, § 6711, which is in these words:

“A person who wilfully, with intent to defraud, by color or aid of a check or draft, or order for the payment of money or the delivery of property, when such person knows that the drawer or maker thereof is not entitled to draw on the drawee for the sum specified

therein, or to order the payment of the amount, or delivery of the property, although no express representation is made in reference thereto, obtains from another any money or property, is guilty of stealing the same, and punishable accordingly."

The gist of the offense defined by this statute is the obtaining, with intent to defraud, the money or property of another by false pretenses; that is, by color or aid of a check or draft which the accused has no reason to believe will be paid. In negotiating a check the maker does not necessarily represent that he then has with the bank funds out of which it will be paid, but he does represent by the act of passing the check that it is a good and valid order for its amount, and that the existing state of facts is such that in the ordinary course of business it will be met; or, in other words, he impliedly represents that he has authority to draw the check, and that it will be paid on presentation. Such authority need not be expressed, but it may be inferred from the course of dealing between drawer and drawee. 7 Am. & Eng. Enc. 738; *Queen v. Hazelton*, L. R. 2 Crown Cas. 134; *Com. v. Drew*, 19 Pick. 179; *Barton v. People*, 35 Ill. App. 573. Therefore if the defendant in this case, when he negotiated the check here in question, had good reason to believe, and honestly did believe, that he had authority to draw it, and that the then existing state of facts was such that the check would be paid in the ordinary course of business, he is not guilty of obtaining money by false pretenses, although the check was not in fact paid for want of funds. If such be this case, the intent to defraud, the gist of the alleged offense, would be wanting. On the other hand, if he did not have any reasonable cause for believing that he was entitled to draw the check, and that it would be paid, the jury would be justified in inferring from such a state of facts that he intended to defraud by color or aid of the check, and he was rightly convicted.

The important question, then, in this case, and the only one we deem it necessary to consider, is whether the evidence is sufficient to sustain the verdict of guilty.

The evidence on the part of the state was to the effect following: The Lord Milling Company, a corporation, and hereinafter designated as the "corporation," had been engaged in the business of buying wheat and manufacturing it into flour at Elysian, in Le

Sueur county, for more than five years next before July 28, 1898. John S. Lord was its president, and the defendant Charles F. Johnson was its secretary and treasurer. It did its banking business during this time with the Bank of Waterville, located at Waterville, this state, seven miles distant from Elysian. When the corporation needed money for immediate use in purchasing wheat for its mill, it was accustomed to draw its check on the Bank of Waterville, payable to J. S. Morton & Co., doing a banking business at Elysian, and get the cash on it. The account of the corporation with the bank was overdrawn "off and on" for a year before the making of the check here in question, but its checks were always paid by the bank. This overdraft amounted on June 15, 1898, to \$4,600, and on that day the cashier of the bank wrote to the corporation, stating the amount thereof, and requesting that it be adjusted. Thereupon and on the next day Lord and Johnson went to the bank, and gave to it the note of the corporation for \$5,000, dated on June 16, 1898, payable, with interest, in 45 days after date, and secured its payment by a pledge of the stock of the corporation. The cashier testified that this note was taken, not in payment of the overdraft, but as collateral security for its payment. Nothing was said at this or any other time with reference to a discontinuance of the practice of making overdrafts by the corporation. On the contrary. the bank continued to pay all the checks of the corporation to July 23, 1898, inclusive. The cashier's testimony on this point is this:

"Q. Was there anything said at that time with regard to their payment of the note or the payment of the overdraft? A. There was as to the payment of the overdraft. Q. And what was said? A. I said to them that I didn't want them to consider they had 45 days' time on that note or on the overdraft. I wanted them to reduce the overdraft at once. Q. And they did, didn't they? A. Yes. Q. And between June 16, 1898, and July 20, 1898, they had reduced it from \$4,606.71 to \$3,569.88, or more than \$1,000, hadn't they? A. Yes, sir. Q. How had they reduced that? A. Well, by remittance. They had made more remittances, but they were drawing out at the same time. Q. Well, now you paid all of their checks,—you honored and paid all of the checks drawn on your bank by the Lord Milling Company from June 16, 1898, to July 1, 1898, didn't you? A. Yes, sir. Q. And you also honored and paid all of the checks drawn on you and presented at your bank between July 1, 1898, and July 23, 1898, didn't you. inclusive? A. Yes, sir."

The defendant Johnson, on July 20, 1898, in the usual course of the business of the corporation, drew its check for \$150 on the Bank of Waterville, payable to J. S. Morton & Co., who cashed the check, and the money was used in the business of the corporation. This check was presented to the bank for payment July 25, 1898, and payment refused, and on July 28, 1898, the bank commenced suit against the corporation and attached its property. This was the first refusal of the bank to pay the checks of the corporation, and there was no previous communication between them as to the overdraft, except that the cashier sent to the corporation its usual monthly statement on July 1, which showed that the \$5,000 note had not been credited on the account, and that there was an overdraft. Two days subsequent to the making of this check the bank cashed 11 checks of the corporation, aggregating \$730, and on the third day thereafter it paid a further check of the corporation amounting to \$176, and two days after the making of such check the corporation deposited \$608 on account with the bank, and between June 16, the time of the making of the note, and July 25, the corporation paid into the bank on its overdraft or note some \$1,600. There was only slight, if any, evidence that the corporation was insolvent in fact at the time the check was made. So much for the evidence on the part of the state.

The case was dismissed as to Lord, on motion of the prosecution, at the close of the evidence for the state. Both Lord and the defendant testified that their understanding was that the \$5,000 note paid the overdraft, and that it was given for some \$400 more than the overdraft, so that they would have enough to their credit to pay their checks until they made further deposits; that the cashier first wrote a note for the exact amount of the overdraft, but, on the suggestion of the defendant and for the purpose stated, the cashier prepared a new note for \$5,000, which was executed on behalf of the corporation. This evidence as to changing the amount of the note and the reason therefor was not contradicted by the cashier, nor did he offer any explanation why the change was made, or why the note was finally made for \$400 more than the overdraft, if it was taken simply as collateral thereto. The defendant also testified that, at the time he made the check and received the money thereon

for the corporation, he believed that he had a right to do so, and that the corporation had funds in the bank to meet it. It is not clear on the face of the record that the preponderance of the evidence, on the question whether the note was given to adjust the overdraft, is not in favor of the defendant. But, assuming, as we must, for the purpose of this appeal, that the cashier's testimony on this question is entirely correct, and that there was an overdraft at all times after the note was given, still the undisputed evidence is well-nigh conclusive that the defendant had good reason to believe, and did honestly believe, at the time he made the check in question, that he was entitled to draw it, and that it would be paid in the usual course of business, and that he had no intention of defrauding any one by the check or otherwise.

We are in full sympathy with the suggestions of the attorney general that business interests must not be jeopardized with impunity by dead beats and kilters drawing and circulating worthless checks, but such is not this case. The evidence so absolutely fails to show that the defendant made the check and received the money thereon, with intent to defraud, that we should be false to our duty if we failed to set the verdict of guilty aside. It is clear from the course of business between the bank and the corporation that the latter was impliedly authorized to make overdrafts, and that the authority was not revoked until after the check in question was made. The most that can be claimed from the evidence is that the corporation was to draw no more checks on the bank, unless the overdraft was reduced. This condition was complied with, and the bank continued without objection to pay the checks of the corporation after the giving of the note, as it had done before. Two days after the check in question was made and negotiated, the bank paid 11 checks of the corporation aggregating \$730, and three days thereafter another for \$176; and the corporation, two days after the check was drawn, deposited with the bank an amount four times greater than the amount of the check. These facts are radically inconsistent with the claim that the defendant intended to defraud J. S. Morton & Co. or any one else when he negotiated the check of the corporation for its use and benefit.

The verdict is clearly unsupported by the evidence, and it is set aside, and a new trial granted.

GEORGE BEATTY and Another v. HOWE LUMBER COMPANY.

July 14, 1899.

Nos. 11,543—(94).

Contract—Payment in Instalments—Breach.

Where a contract for cutting, booming, and delivering logs provides for payment in instalments, a failure to pay an instalment when due is not such a breach of the entire contract as to authorize the contractor to refuse to proceed further, and to recover the profits which he would have earned had the contract been fully performed on his part. In such case the contractor may abandon the work, and recover for what has already been done under it; but mere nonpayment of money due on such instalment is not, of itself, such denial of the rights of the contractor to continue the performance of the services under the contract.

Action in the district court for St. Louis county to recover \$16,136.48 for breach of contract. From an order, Ensign, J., overruling a demurrer to the second and third causes of action in the complaint, defendant appealed. Reversed.

W. G. Bonham and Francis W. Sullivan, for appellant.

At most the action of plaintiffs in abandoning the contract amounted to a rescission because of defendant's alleged breach. If plaintiffs elected to rescind, the contract cannot serve as a basis for a claim for future profits. The right to future profits proceeds on the theory that the contract is in force; and to recover, where performance is a condition precedent to the right to recover such profits, plaintiffs must aver and prove performance or excuse for nonperformance. *Lake Shore v. Richards* (Ill.) 32 N. E. 402; *U. S. v. Behan*, 110 U. S. 338. If, indeed, the breach had been such as to prevent continuing performance, plaintiffs could treat the breach as putting an end to the contract for purposes of performance, and sue for the profits they might have realized. In such case the breach must have been such as to make it physically impossible to

continue performance, or performance by the defaulting party must have been a condition precedent to performance by the other. *Palm v. Ohio*, 18 Ill. 217; *County v. Overholt*, 18 Ill. 223; *Cox v. McLaughlin*, 54 Cal. 605; *Lake Shore v. Richards*, supra; *Wharton v. Winch*, 140 N. Y. 287; *Moore v. Taylor*, 42 Hun, 45, 49 N. Y. Sup. Ct. 45. Under the most unfavorable view of the law, there must have been such acts on part of the defaulting party as to amount to repudiation and refusal to be bound by the contract. Mere nonpayment of an instalment is not basis for an action for future profits, since it is neither prevention nor repudiation. *Palm v. Ohio*, supra; *County v. Overholt*, supra; *Cox v. McLaughlin*, supra.

As to plaintiffs' contention that it was understood that it would be necessary for them to secure supplies, etc., for carrying on the work, it is enough to say that the contract expresses no such understanding. *Doud, Sons & Co. v. Duluth Milling Co.*, 55 Minn. 53. Special damages cannot be recovered unless pleaded.

Baldwin & Baldwin, for respondents.

The understanding of the parties at the time of making a written contract may be shown to explain the reason for a provision, though not to vary the terms. *Palmer v. Breen*, 34 Minn. 39; *Frohreich v. Gammon*, 28 Minn. 476; *Liljengren F. & L. Co. v. Mead*, 42 Minn. 420. By reason of defendant's refusal to perform, plaintiffs were prevented from completing the contract. It matters not what the breach was, so long as it was a breach of an important covenant. *Palmer v. Breen*, supra; *Nichols v. Scranton*, 137 N. Y. 471. The third cause of action at least states a cause for nominal damages. *Merriam v. Pine City L. Co.*, 23 Minn. 314.

BUCK, J.

This action is brought to recover damages for the violation of the terms and conditions of a written contract, made between the parties, and dated September 8, 1897, a copy of which is set out and made a part of the complaint.

The substance of the contract is that plaintiffs, the Beattys, as parties of the first part, agreed with the Howe Lumber Company, as party of the second part, to cut a certain amount of pine lumber, and boom and deliver to the latter, in Vermilion Lake, as early as

April 10, 1898, all merchantable pine timber on and belonging to certain land in St. Louis county, Minnesota, for which said lumber company agreed to pay plaintiffs the sum of \$4 per thousand for all Norway logs, and \$6.50 per thousand for all white pine logs, payments to be made as follows: Two dollars per thousand on the 25th day of the month following the month in which said logs are delivered; an additional \$1 per thousand April 10, 1898; and the balance of the purchase price July 10, 1898. But, as a small portion of the logs were to be delivered at a small lake elsewhere, the lumber company was to retain and hold back 25 cents per thousand feet of the first payment of the purchase price of said logs till they were delivered at a point known as the "Big White Rock," where the lumber company would fasten its tug to the raft, and the final payment was not to be made till said logs were delivered at said point. The contract contains other provisions as to length of logs, doing the work, quality of logs, furnishing necessary chains, breaking of booms, scaling of logs, and lienable claims. It also contained this provision:

"It is further agreed: Whereas the second party has looked over certain lands, to wit, section 36, township 64, range 19, and southeast quarter of section 26, in township 64, range 19, with a view to procuring the pine on said lands: If the second party procures the logs on both or either of said tracts, then the first party is to cut, boom, and deliver said logs to second party within times hereinbefore stated for the sum of \$4.50 per thousand feet; payments to be made the same as hereinbefore stated. If the first party procures the logs on both or either of said tracts, then they are to cut, boom, and deliver said logs to second party within the same times hereinbefore stated, and second party to pay therefor the sum of \$6.50 for white pine and \$4.50 for Norway, at same time and in same amounts as hereinbefore stated."

| After making said agreement the defendant procured the pine on said section 36 and section 26, and notified plaintiffs thereof, and requested plaintiffs to cut, boom, and deliver said pine pursuant to the terms of said agreement; and plaintiffs entered into the performance thereof, and continued to cut, boom, and deliver said pine, and cut and delivered more than a million feet thereof, and on February 25, 1898, there became due on said contract to plaintiffs,

\$1,750, when plaintiffs demanded that the amount due for the pine delivered during the month of January, 1898, be calculated and ascertained, and plaintiffs paid therefor, which defendant refused to do, and thereupon plaintiffs abandoned the contract.

There are three causes of action alleged in the complaint. The first one has been answered by the defendant on the merits, and the issue thereby formed is still pending.

For the second cause of action plaintiffs reallege so much of the first cause of action as we have herein recited, and further allege:

"That at the time of entering into said agreement, and at all times, it was understood between plaintiffs and defendant that it would be necessary for plaintiffs to secure large quantities of supplies necessary for carrying on the work, and that it would be necessary for plaintiffs to secure such supplies on their credit, and to pay for the same to the persons from whom they should be purchased with the moneys agreed by defendant to be paid to plaintiffs on the 25th of each month as aforesaid, and for that reason it was provided by the terms of said agreement between plaintiffs and defendant that defendant should make the payments provided for by said agreement on the 25th day of each month for all pine delivered during the preceding month, and accordingly plaintiffs did purchase on their credit, prior to said 25th day of February, 1898, large quantities of supplies necessary for carrying on said work, and agreed to pay for said supplies on the 25th day of February, 1898; and by reason of defendant's refusal to pay to plaintiffs the amount due them on February 25, 1898, as aforesaid, plaintiffs were unable to pay for the supplies which had been purchased by them as aforesaid prior to February 25, 1898, and were unable, by reason thereof, to purchase or procure supplies necessary for continuing said work of cutting, booming, and delivering said pine from and after February 25, 1898; and by reason of defendant's failure to pay to plaintiffs the amount due them as aforesaid on February 25, 1898, and the inability of plaintiffs to procure supplies necessary for carrying on said work after said date, plaintiffs could not continue after said February 25, 1898, to perform said work, and were compelled to, and did, thereupon cease to cut and deliver said pine, except that, for the purpose of saving and preserving certain pine logs which were then lying in the woods, plaintiffs continued for a period to haul said last-mentioned logs to the water with a few teams and men."

The plaintiffs further allege that, by reason of the failure of defendant to pay them said sum of **\$1,750** due them, they were prevented from completing said contract, as they otherwise would have

done, on February 25, 1898, and they thereby abandoned said contract, and have never since performed any service upon it, and that by reason of defendant's breach of said contract they have damages, in the loss of profits which they would have made, amounting to several thousand dollars.

The third cause of action sets out that, after plaintiffs abandoned the contract, they owed various sums of money to laborers who had been employed by them in the performance of the contract prior to February 25, 1898; that, after said time, for the purpose of preserving plaintiffs' credit, and preventing the filing of liens upon the logs, it was agreed between plaintiffs and defendant that, if plaintiffs would give an order to pay said labor claims, defendant would forthwith pay the same, and charge the same to the amount claimed to be due from defendant to plaintiffs for services theretofore rendered, and sued for in the first cause of action; that plaintiffs gave defendant an order to pay these claims, but plaintiffs allege, on information and belief, that defendant neglected to pay the claims, whereby plaintiffs' credit was greatly damaged, in the sum of \$3,000.

Defendant demurred, separately, to the second and third causes of action set forth in the complaint, upon the ground, in each case, that they did not state facts sufficient to constitute a cause of action. The demurrers were argued in the lower court, and both were overruled. From the order overruling the demurrers, defendant appeals.

It is apparent that the main controversy is over the second cause of action, viz., for anticipated profits. The appellant insists that by the very terms of the written contract no such damages were contemplated by the parties at the time of the execution of said contract. The contract was made a part of the complaint, and its terms would control any inconsistent allegations in the complaint. *Doud, Sons & Co. v. Duluth Milling Co.*, 55 Minn. 53, 56 N. W. 463. Certainly the contract itself does not show that at the time of entering into the contract it was understood between plaintiffs and defendant that it would be necessary for plaintiffs to secure large quantities of supplies necessary for carrying on said work. The contract speaks for itself. Its terms constitute the guide for each

party, with the obligations for each; but there is no specified liability therein stated in case of nonperformance, and the terms of the written contract cannot be changed or varied by what the parties are alleged to have understood or contemplated, other than is warranted by the terms of the contract; and hence the allegations of the complaint relative to such understanding are immaterial, and constitute no ground for a cause of action. *Doud, Sons & Co. v. Duluth Milling Co.*, *supra*.

Did the mere fact that the defendant failed to pay the first instalment due February 25, 1898, create such a breach of the contract as to authorize the plaintiffs to recover anticipated profits on the unperformed part of the work?

It cannot be said that it anywhere appears in the complaint that defendant in any manner interfered with or prevented plaintiffs from proceeding with the work, and it is a fair inference from the allegations in the complaint that the defendant was anxious for them to continue work on and after February 25, 1898. There was no denial by defendant of the right of the plaintiffs to continue in the performance of the service, and no refusal on its part to be bound by the contract, and no consent to plaintiffs' abandonment of the contract; nor was there any refusal on the part of the defendant to receive the logs which plaintiffs might cut and deliver in the future under the terms of the contract. It is doubtless true that a failure to pay the instalment due was a breach of the terms of the contract, and they were not bound to wait for the defendant to make the payment, and plaintiffs then had the right to abandon the contract, or they might have continued to perform the services, and have brought suit for the instalments due. Although the plaintiffs abandoned the contract on the very day of the defendant's failure to pay them the instalments due, yet the defendant placed no obstacle in the way of their going on with the work, unless a failure to pay the instalment due can be so regarded. But there is nothing in the contract which makes a failure to pay an instalment due at a stated time a condition precedent to the further prosecution of the work, and which made its nonpayment such a violation of the contract as to authorize the other party to abandon the work, and sue upon it as for having been prevented from completing it

by the act of the party who had thus failed to perform such condition precedent; hence the law cannot infer such a consequence from the ordinary obligation to pay money at a particular time or upon the completion of a specified part. *Palm v. Ohio*, 18 Ill. 217.

Numerous other authorities sustain this position. In *Wharton v. Winch*, 140 N. Y. 287, 35 N. E. 589, it is said that, where a contract for a railroad construction provides for payment in instalments as the work progresses, a failure to pay an instalment when due is not such a breach of the entire contract as to authorize the contractor to refuse to proceed further, and to recover the profits which he would have earned had the contract been fully performed; and where an action is brought by the contractor before completion of the contract, to authorize a recovery of prospective profits, a willingness on his part to complete the work, and a refusal of defendant to be further bound by the contract, or an abandonment by him, must appear. In the case of *Keeler v. Clifford*, 165 Ill. 544, 46 N. E. 248, it is held that, upon nonpayment of an instalment due under a contract, the party entitled thereto may abandon the contract, and recover the amount actually due thereunder; but he cannot recover lost profits on abandonment, unless prevented by the other party from completing the contract. In *Cox v. McLaughlin*, 54 Cal. 605, it was held that a mere failure to pay money due upon the contract before the completion of the work does not constitute a prevention of the completion of the work. In *Bethel v. Salem*, 93 Va. 354, 25 S. E. 304, it is held that the loss of profits for the unperformed part of a contract cannot be included in the damages for breach of the contract by mere nonpayment for the part performance, even if that prevented further performance.

We think that these cases enunciate the correct rule. The effect of the default was to give the plaintiffs an immediate remedy to recover the stipulated amount, but this remedy was not inconsistent with their right to go on with the contract. It could make no difference with the legal liability of the defendant whether the plaintiffs were rich or poor. If they had been rich, or had ample means, it is evident, from the record, that they would or could have continued to perform the services; but if they were unable to go on with the work solely on account of their want of means, or because

of defendant's refusal to pay the instalment due according to the terms of the contract, the consequence of such failure is a question of law for the court upon the admitted or proven facts. And the rule of law which in some instances permits the innocent party to recover damages in the way of anticipated profits rests upon the fact that one party is prevented by the act of the other from realizing the benefit which the contract furnishes; but a denial of this right does not rest in the mere default in the payment of an instalment when it becomes due, especially when, as in this case, there is an entire absence in the contract of any legal liability contemplated by the parties as to damages for anticipated profits, and there was no denial of the legal right of the plaintiffs to proceed in the performance of the contract unaffected by the conduct or default of the defendant.

There is no merit in the third cause of action, the damages alleged being entirely too remote, and the order overruling defendant's demurrer to the second and third causes of action in the complaint is reversed.

ALFRED SCHEFFER and Another v. JAMES LOWE.

July 14, 1899.

Nos. 11,579—(173).

Conversion—Verdict Sustained by Evidence.

Evidence considered, and *held* sufficient to sustain the verdict of the jury.

Action in the district court for Murray county for conversion. The case was tried before P. E. Brown, J., and a jury, which rendered a verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiffs appealed. Affirmed.

Morphy, Ewing & Gilbert, for appellants.

M. E. Foley, for respondent.

BUCK, J.

The plaintiffs brought this action to recover from the defendant, Lowe, damages for alleged conversion to his own use on February

12, 1898, of certain goods and merchandise, of the alleged value of \$450, which they claim to have bought of one Mary King. The goods were situated in the village of Fulda, Murray county, in this state, where King resided, and of which county Lowe, the defendant, was sheriff. In defense of the plaintiffs' claims, Lowe alleges that, in an action brought by one Dobereiner against Mary King, a writ of attachment was issued out of the district court of Murray county, and under said writ he levied upon the goods described in the complaint, as the property of Mary King, whose goods he claims they were, and that the alleged purchase of said goods by plaintiffs from Mary King was made for the purpose of hindering, delaying, and defrauding creditors, and that plaintiffs had knowledge of it, or participated in such transaction.

It appears that on February 10, 1898, Mary King was doing business as a dealer in harness and other goods in said village of Fulda, and on that day one of the plaintiffs came to Fulda, on a telegram from Mary King, and, in a short time after his arrival, King executed a bill of sale of these goods to plaintiffs, and that plaintiffs' claim against her did not exceed the sum of \$300, while the value of the goods conveyed by her in payment of this claim exceeded \$600; that some of the goods in her store were immediately packed February 11, 1898, and shipped to St. Paul, where plaintiffs resided; that King was at that time heavily indebted to other persons, and was insolvent; that one of plaintiffs' firm, who was in Fulda on the day of such sale (February 10, 1898), went away from Fulda the next day, and left one Peters (King's clerk) to manage the store and the said goods therein so conveyed, and who had previously, and up to the time of such sale, conducted said store and handled said goods for Mrs. King, and that said clerk handled said goods in the same store where Mrs. King had formerly kept them; and that no arrangement was made in reference to paying rent to Mrs. King, who owned and lived in said store.

Notwithstanding the stock of goods consisted of a large number of articles, and different kinds of goods, an examination thereof was made by Scheffer, one of the plaintiffs, in 15 minutes, or less, and the alleged purchase made without taking an inventory. The goods so packed and shipped by Scheffer to St. Paul were of the

value of \$145, and were taken from the stock on hand in the store of Mary King, upon the alleged ground that they did not belong to her, but to plaintiffs, and were previously shipped to her by mistake, and upon an order which had been countermanded. On the night of February 11, 1898, Peters, as clerk of plaintiffs, sold and delivered to Elder & Devault five sets of double harness out of the said stock, for the sum of \$100, which harnesses were hauled away from the store that night and stored in Elder's barn, and only \$20 cash was then paid therefor, and a note for \$80 for the balance of the purchase price of said harnesses was executed by Elder & Devault; but, instead of running to plaintiffs, it was made to M. King & Co., in full settlement for such purchase.

The cause was tried by a jury, and it returned a verdict in favor of the defendant. The issue squarely presented was whether each party (Mary King and plaintiffs, the vendor and vendees of the property) did not knowingly and intentionally enter into a fraudulent agreement and sale of the property for the purpose of defrauding, hindering, and delaying creditors, and the sale was a mere pretense. It is not a case where one of the parties is admitted or proven to be an innocent party to the transaction, but where it is alleged that both parties to the transaction conspired to defraud other creditors out of their just demands against Mary King, and that to this end the sale was made hastily, for an inadequate consideration, and to such an extent as to create in the mind a suspicion of fraud. The trial court denied plaintiffs' motion for a new trial, and they appeal.

Evidence as to the manner in which Peters (ostensibly left in charge by the plaintiffs) conducted the business, including his sale of the harnesses to Elder, was competent. Of course, the plaintiffs had the right to explain or rebut it. Perhaps it cannot be properly said that there is a great preponderance of evidence in favor of the verdict, but the questions involved were proper to be submitted to a jury, hence the verdict should not be disturbed.

Order affirmed.

NATIONAL GERMAN-AMERICAN BANK OF ST. PAUL v. ALICE G.
LAWRENCE and Another.

July 14, 1899.

Nos. 11,690—(218).

**Resulting Trust—Husband and Wife—Examination of One without
Consent of Other.**

In an action against both husband and wife by a judgment creditor of the husband to enforce a resulting trust against the land of the wife for the payment of the judgment, on the ground that the consideration for the grant to the wife was paid by the husband, neither the husband nor the wife can be examined as a witness for the plaintiff without the consent of the other spouse.

Same—Husband Proper Party.

The husband, although not a necessary party, is a proper party, to the action, and has a certain, direct, and immediate interest, if not in the event of the suit itself, at least in the record, as an instrument of evidence for or against himself.

Same—Effect of G. S. 1894, § 5659.

G. S. 1894, § 5659, permitting the examination of an adverse party as if under cross-examination, did not change the law as to the competency of witnesses.

Same—Declarations.

The declarations of husband and wife are subject to the same rules of exclusion which govern their testimony as witnesses.

Same—Statutory Privilege—Charge to Jury.

The mere fact that one spouse avails himself or herself of the statutory privilege of refusing to consent to the examination of the other spouse as a witness constitutes no ground for the court's instructing the jury that they may take that fact into consideration, as tending to raise the presumption that the testimony, if given, would not have been favorable to the nonconsenting spouse.

On Reargument.

October 19, 1899.

Husband and Wife—Cross-Examination of Voluntary Witness.

The wife, with the consent of the husband, having testified as a witness in her own behalf as to certain matters material to the issues on trial, *held*, that the court erred in excluding, on cross-examination, a question

which was both competent and proper cross-examination. Where, in an action against both husband and wife, one spouse, with the consent of the other, testifies as a witness in his or her own behalf, the cross-examination is not limited to matters inquired of in the direct examination. In such case, the other spouse completely waives the statutory privilege that one spouse shall not be examined as witness for or against the other spouse without his or her consent; and the witness may be cross-examined concerning any matter pertinent to the issue, regardless of the extent of the direct examination.

Action in the district court for Wabasha county to subject to the lien of a judgment against defendant James G. Lawrence land standing in the name of defendant Alice G. Lawrence, his wife, on the ground that the consideration was paid by him and title taken in her name in fraud of creditors. The case was tried before Snow, J., and a jury, which rendered a special verdict to the effect that the consideration paid for the land was the money or property of the husband. The court made findings of fact and conclusions of law, whereby it found in favor of defendants. From an order denying a motion for judgment notwithstanding the verdict and findings or for a new trial, plaintiff appealed. Reversed on rehearing.

Merrick & Merrick, for appellant.

Webber & Lees and *McGovern & Murdoch*, for respondents.

MITCHELL, J.

This action was brought by a judgment creditor of James G. Lawrence against him and his wife to enforce a resulting trust in plaintiff's favor in certain real estate, the grant of which was made to the wife, but the consideration therefor paid, as is alleged, by her husband, the judgment debtor. G. S. 1894, §§ 4280, 4281. Upon the trial the plaintiff called the husband as a witness, and proposed to examine him as an adverse party, under G. S. 1894, § 5659. To this the wife objected on the ground that a husband could not be examined for or against his wife without her consent. G. S. 1894, § 5662. The court sustained the objection. The plaintiff then called the wife as a witness, and proposed to examine her, under the statute, as an adverse party. To this the husband objected on the ground that the wife could not be examined for or against her husband without his consent. The court sustained the objection.

The correctness of these rulings presents the principal question in the case, the answer to which depends upon the construction of G. S. 1894, § 5662, which, so far as here material, reads as follows:

"A husband cannot be examined for or against his wife, without her consent; nor a wife for or against her husband, without his consent; * * * but this exception does not apply * * * to proceedings supplementary to execution."

At common law, where parties could not be witnesses for themselves, neither a husband nor a wife could be a witness in any cause, civil or criminal, in which the other was a party. This exclusion was founded partly on the identity of their legal rights and interests, and partly on grounds of public policy, in order to encourage and preserve inviolate the confidence of the marriage relation. The first of these has been removed by our statute abolishing the incompetency of witnesses on account of interest, and the interest of a person in the result of a cause is no longer of importance, except so far as it may aid in determining whether the evidence of a husband or wife, if admitted in a given case, will be for or against the other spouse, within the meaning of our statute. But the second ground of exclusion, viz., to encourage and preserve inviolate the confidence of the marriage relation, as expressed in the preamble to section 5662, still remains; and to that extent the statute must be construed, if not as merely declaratory of the common law, at least in the light of it. It would seem too plain for argument that in this case the testimony of the husband, if admitted, would have been for or against the wife, whose property was sought to be charged with a trust in favor of her husband's creditor, and hence clearly inadmissible without her consent.

The only distinction attempted to be drawn between the admissibility of the testimony of the wife and that of the husband is that the latter was not a necessary party to the action, and had nothing to gain or lose by its result, and, therefore, that his wife's testimony could not be for or against him, but only for or against herself, and hence not within the exclusion of the statute. But, while not a necessary party, the husband was a proper party, to the action; and, being such, the judgment would be binding and conclu-

sive upon him as to all matters therein determined. Hence he would have a certain, direct, and immediate interest, if not in the event of the suit itself, at least in the record, as an instrument of evidence for or against himself. For example, if the judgment in this case had been in favor of the plaintiff, it would have been conclusive evidence against him, in any other action between him or his privies and the plaintiff or its privies, that the land in controversy was impressed in the hands of his wife with a trust in favor of the plaintiff for the payment of its judgment,—a fact which might materially affect his rights, as husband, in the property.

In *Leonard v. Green*, 30 Minn. 496, 16 N. W. 399, cited by plaintiff, which was an action of the same nature as the one at bar, the wife was held to be a competent witness for the plaintiff because the husband was no longer a party to the suit, it having been previously dismissed as to him, "the plaintiff waiving any possible right he might have to bind or affect, by the judgment in this action, any interests which the husband might assert or claim." The grounds upon which the decision of that case was put implies that, if the husband had been retained as a party to the action, the wife would not have been a competent witness for the plaintiff. It is also a significant fact that counsel have found no case, under either the common law or any statute, against both the husband and the wife, in which it was held that either was a competent witness without the consent of the other.

The statute allowing a party to examine an adverse party as a witness as upon cross-examination in no way affects or changes the law as to the competency of witnesses. The court was therefore right in sustaining the objection to the examination of both the husband and the wife.

2. The husband had been examined in proceedings supplementary to execution in the action in which plaintiff's judgment had been rendered, and the wife had been examined as a witness in the same proceedings. These examinations were had before a referee. Upon the trial of the present action the plaintiff offered in evidence portions of the testimony of each, as contained in the report of the referee. This evidence stood upon the same footing as any other declarations or admissions of the parties. These alleged declara-

tions or admissions were not proven in the proper way, or by any competent evidence, but no objection to the introduction of the referee's report was made upon that ground.

The trial court admitted a part and excluded a part of the offered evidence. The ground upon which the court admitted a part of this evidence was that, as the statutory exclusion did not apply to proceedings supplementary to execution, therefore the testimony of the husband and the wife, given in such proceedings, would, if otherwise competent, be admissible in any other action to which they were parties. The ground upon which he excluded the remainder of the offered evidence was that only those declarations or admissions of the defendants would be admissible which immediately tended to prove who paid the consideration for the particular grant which was the subject of this action. If the court had been correct in the reason assigned for admitting a part of the offered evidence, it would be very difficult, if not impossible, to sustain his action in confining its admission to such narrow limits, in view of the liberality in the admission of evidence permissible in cases of this character. But, in our opinion, none of the declarations of either the husband or wife, made in the proceedings supplementary to execution, were admissible in this case.

The exception from the exclusion of the statute in favor of supplementary proceedings is only for the purposes of the examination in such proceedings. It does not follow that, for the purposes of another action, declarations of a husband or wife made in their examination in such proceedings stand in any different position from declarations made by either of them under any other circumstances. To hold that they did would result in evading the statute, in the language of the trial judge, by "whipping the devil round the stump." The law is that the declarations of husband and wife are subject to the same rules of exclusion which govern their testimony as witnesses. Any other rule would open the door to all the evils which the statute and the policy of the law were designed to prevent. This was the rule at common law, and, in view of the expressed purpose of the statute, we do not think it was intended to at all change or modify the rule. 1 Greenleaf, Ev. § 341; 1 Phillips, Ev. 80; Hall v. Hill, 2 Strange, 1094; Kelly v. Small, 2 Esp.

716; *Alban v. Pritchett*, 6 Term R. 680; *Denn v. White*, 7 Term R. 112; *Brown v. Lasselle*, 6 Blackf. 147; *Ross v. Winners*, 6 N. J. L. 366; *Hawkins v. Hatton*, 2 Nott & McC. 374; *Hussey v. Elrod*, 2 Ala. 339; *Funkhouser v. Pogue*, 13 Ark. 295; *Burnett v. Burkhead*, 21 Ark. 77.

There was therefore no prejudicial error in the court's excluding a part of the offered evidence.

3. The mere fact that one spouse avails himself or herself of the statutory right to refuse to consent to the examination of the other as a witness would be no ground for the court's instructing the jury that they might take that fact into consideration, as raising a presumption that such testimony, if given, would not have been favorable to the nonconsenting spouse. It is not a case of the suppression of evidence, within the meaning of the rule applied in *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 74 N. W. 166.

4. The burden of proof was upon the plaintiff, and, while the evidence was somewhat suggestive that the alleged agency of the husband for his wife was merely colorable, we cannot say that it did not justify the finding of the jury upon the question submitted to them.

This covers all the points in the case worthy of special notice, and the result is that the order denying a new trial must be, and hereby is, affirmed.

A reargument having been granted on the questions raised by the appellant's fourteenth assignment of error, the following opinion was filed October 19, 1899.

MITCHELL, J.

In this case a reargument was granted upon the fourteenth assignment of error, which was overlooked and not disposed of in the opinion of the court.

After the plaintiff had introduced portions of what purported to be the record of the testimony of the wife as a witness in the proceedings supplementary to execution against her husband, as stated in the original opinion, the attorney of the defendants, with the consent of the husband, called the wife as a witness, and, after calling her attention to the following portion of the record: "Q.

As you had no property, real or personal, at the time of Mr. Lawrence's assignment, not exempt, tell us from what sources and in what manner you acquired personal and real property. A. I don't think I can; these lots Mr. Lawrence borrowed money to pay for,"—then asked her whether she so testified; to which she replied that she did not think she did; that, if she did, she misspoke herself; that Mr. Lawrence did not borrow the money to pay for the lots; that she herself borrowed it. On cross-examination, she testified that her agent borrowed the money for her; that her agent was Mr. Lawrence, her husband. She also testified that her husband became her agent immediately or soon after he made the assignment for the benefit of creditors, in October, 1884, and had been her agent continuously ever since, down to the time of the trial (November, 1898). Plaintiff's counsel then asked her, "What was the purpose of that agency?" to which defendants' counsel objected, on the grounds that it was not cross-examination, and was incompetent, irrelevant, and immaterial. The court sustained the objection, remarking that the question of agency should be confined to the real-estate transactions; that it did not matter in this case whether he (the husband) was her agent for other purposes or not; that the question for consideration here was, who bought this property and who paid for it. The fourteenth assignment of error challenges the correctness of this ruling.

The evidence sought to be elicited by the question was both competent, material, and proper cross-examination. Here was a case where immediately or soon after the husband became insolvent he began ostensibly to act as the agent of his wife. This agency had been continuous ever since, a period of over 14 years. The purchase of the property in dispute, and the alleged borrowing of money to pay for it, were transacted under this continuing employment of agency, as all other transactions had been during that time. The vital question in the case was whether this alleged agency was actual and bona fide, for the purpose of transacting the business of the wife, or merely colorable, for the purpose of enabling the insolvent husband to transact his own business, or business for himself ostensibly in his wife's name, so as to cover up from his creditors such property as he then had or might thereafter acquire.

This being the important issue in the case, it was competent to inquire as to the whole nature and scope of this continuing agency, under which it was alleged that the husband had, as agent of his wife, purchased these lots and borrowed the money to pay for them. It was also legitimate cross-examination upon the matter elicited by the witness' examination in chief, especially in view of the great latitude of examination allowed in cases of this nature. See *Cohen v. Goldberg*, 65 Minn. 473, 67 N. W. 1149. The ruling of the court was none the less prejudicial error, because the evidence introduced by the plaintiff, which induced the defendants to call the wife as a witness, may have been incompetent.

It is suggested that the ruling complained of was not prejudicial, because it still left it open to the plaintiff to inquire of the witness as to the husband's agency in the particular transaction of the purchase of the lots, which alone was involved in this action. This proceeds upon the same false theory which the learned trial judge seems to have adopted, viz., that no evidence was admissible that did not immediately and directly tend to prove who paid the consideration for the particular grant which was the subject of this action. This is altogether too narrow a view of the scope and extent of legitimate inquiry in an action of this nature. Here was a case where the wife claimed to have created an agency in her husband immediately or soon after he failed in business, some 14 years before, and this alleged agency still continued and was being exercised. The purpose, scope, and character of this entire agency was a legitimate subject of inquiry, for the purpose of throwing light upon the real nature of the transaction which was immediately involved in the present case. The ruling of the court effectually shut off all inquiry on the subject, except so far as it directly and immediately applied to the single transaction of the purchase of these particular lots.

There is another and broader ground upon which the ruling of the court was erroneous.

In view of the object of the statutory prohibition against one spouse being examined as a witness for or against the other spouse without the consent of the latter, we are of opinion that the correct rule is that where one spouse, with the consent of the other, takes

the stand and testifies in the case the cross-examination of the witness is not confined to matters inquired of in his or her direct examination; that, by consenting that his or her spouse may testify, the other spouse completely waives his statutory privilege, and the witness may be cross-examined concerning any matters pertinent to the issue on trial, regardless of the extent of the direct examination. There are eminent authorities holding that this is the rule in criminal cases where the defendant has and exercises the privilege of testifying in his own behalf. See 29 Am. & Eng. Enc. 670. There would seem to be no justice or fairness in permitting one spouse to avail himself or herself of the testimony of the other spouse as to matters where it would be favorable to him or her, and permitting him or her to withdraw consent when it came to matters in which the testimony would be unfavorable.

We do not wish to be understood as meaning that the waiver or consent would extend to communications made by one spouse to the other during the marriage, where such communication was not a subject of inquiry in the direct examination. Such communications stand upon a separate, if not different, footing, and this question is not involved in this case. Indeed, we are not sure that the ruling of the trial court was intended to be in conflict with this proposition; for his exclusion of the offered evidence seems to have been based solely upon the ground that it was generally incompetent, because the inquiry as to the agency of the husband should be confined to what bore directly and immediately upon the purchase of the particular property involved in the action. For the reasons given we think the court erred in the ruling complained of in the fourteenth assignment of error.

The result is that a new trial must be, and is hereby, granted.

JULIA SCHREFFER v. ROCKFORD INSURANCE COMPANY.

July 14, 1890.

Nos. 11,608—(192).

Fire Insurance—Amount of Loss—Arbitration.

A policy of insurance against loss by fire originating from any cause except certain specified ones, provided that the loss should be payable within sixty days after the insured submitted proofs of loss. It also provided that in case of loss, and a failure of the parties to agree as to its amount, the amount of the same should be referred to and determined by three referees, to be chosen in a manner prescribed by the policy; also that such reference, unless waived by the parties, should be a condition precedent to any right of action to recover for the loss. A total loss having occurred, and the proofs of loss having been submitted, and the parties having failed to agree as to its amount, the insurer demanded a reference in accordance with the policy. The insured, acting in good faith, but under incorrect advice of counsel, refused to enter into a reference, and brought an action on the policy, which on the trial was dismissed on the ground that the reference was a condition precedent to a right of action. Thereafter the insured offered to submit the amount of the loss to a reference, but the insurer refused to do so, claiming that by her previous conduct the insured had lost all rights under the policy. The insured then brought this action to recover the loss. There was no evidence that the insurer had lost any legal right, or suffered any damage, by the refusal and subsequent delay of the insured to agree to submit the amount of the loss to a reference. *Held:*

Excepted Causes—Pleading.

The plaintiff was not required to negative in her complaint losses from excepted causes.

Election.

The doctrine of election between inconsistent rights or remedies is inapplicable. The plaintiff never had any election. Her conduct was a mere futile attempt to enforce a right or remedy which she did not possess. This did not prevent her from afterwards enforcing the rights or remedies which she in fact possessed.

Waiver by Insured.

That her refusal at first to submit the amount of the loss to arbitration merely amounted to a waiver of her right to an appraisal, but did not extinguish her right to recover on the policy.

77	291
79	342
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Waiver by Insurer.

That the refusal of the insurer to submit to a reference upon the subsequent offer of the insured to do so was a waiver of its right to an appraisal, and thereupon the insured could maintain an action on the policy without any appraisal.

Payment of Loss.

Under the terms of the policy the loss was not absolutely payable within 60 days after the submission of proofs of loss, but in case of a reference it would not be payable until the referees made their award, assuming that the assured was not at fault in delaying it.

Interest.

That upon the facts of this case the insured was not entitled to interest on the amount of the loss until she offered to submit to a reference.

Action in the district court for Ramsey county to recover \$1,300 on a policy of insurance. The case was tried before Bunn, J., who found in favor of plaintiff for \$1,000; and from a judgment entered pursuant to the findings, defendant appealed. Modified.

Robert A. Eaton, for appellant.

Charles H. Taylor, for respondent.

MITCHELL, J.

This was an action upon a Minnesota standard policy of insurance against loss by fire "originating from any cause except invasion, foreign enemies, civil commotions, riots, or any military or usurped power whatever." The policy provided that:

"In case of loss * * *, and a failure of the parties to agree as to the amount of loss, * * * the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen. The award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of the loss or damage; and such referees [reference], unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

The facts material to this appeal are, briefly, these: The loss, which occurred December 21, 1897, was total, the property being entirely consumed. The parties being unable to agree as to the amount of the loss, the defendant demanded that this should be

submitted to referees, in accordance with provisions of the policy. The plaintiff, under the advice of counsel, refused to enter into a reference or arbitration, claiming that she was not required to do so, and soon after commenced an action on the policy. The trial, which occurred August 11, resulted in the court's dismissing the action on the ground that the reference provided for in the policy was a condition precedent to the right to an action to recover for the loss. About 10 days afterwards the plaintiff offered to the defendant to enter into an arbitration in accordance with the provision of the policy, but it then refused to do so, taking the ground that, on account of plaintiff's refusal to arbitrate when defendant demanded it, and her bringing an action without an arbitration, and her being defeated in that suit, she had no claim or cause of action against the company. Thereupon she brought this action. While the claim is made that the plaintiff's demand for arbitration—or, rather, her consent to arbitrate—was not made within a reasonable time, there was no evidence that the defendant had sustained any loss, or been deprived of any legal right, by the delay.

1. There is nothing in the point that the complaint is defective because it does not negative loss from excepted risks. The plaintiff was not required to do that.

2. Upon the main question in the case going to the merits, counsel for the defendant contends that, under the doctrine of election between inconsistent remedies, the plaintiff, having elected to stand on her right to recover without any appraisal, is bound by her election, and is now estopped to assert her right to recover on the ground that the defendant has waived an appraisal. The doctrine of election between inconsistent rights or remedies has no application. The plaintiff never had any election of rights or remedies. She had but one right or remedy. Her action was a mere futile attempt to assert a right which she never possessed, and in which she was defeated. This did not estop her from subsequently asserting the right and remedy which she in fact possessed. In *re Van Norman*, 41 Minn. 494, 43 N. W. 334.

The foundation proposition, however, of defendant's counsel is, in substance, that the insured, by her refusal, after loss, on demand of the insurer, to enter into arbitration to determine the amount

of the loss, loses absolutely and forever all right to recover on the policy, and that the insurer is thereby absolutely released from all liability. In this counsel is clearly in error. He fails, in our opinion, to distinguish between conditions the breach or nonperformance of which render the policy itself void and those which are merely conditions precedent to the right to bring an action on the policy. Most of the authorities cited by counsel are merely to the effect that an appraisal of the amount of the loss, if not waived, is a condition precedent to the right to bring an action to recover for the loss. Nobody disputes that proposition. A waiver of the right to an appraisal by either party to the contract releases the other from all obligation to enter into an appraisal. Doubtless the refusal of the plaintiff to enter into an arbitration on demand of the defendant amounted to a waiver on her part of the right of an appraisal, so that thereafter she would have no right to insist on defendant's submitting to an appraisal. On the other hand, the subsequent refusal of the defendant to enter into an arbitration when plaintiff offered to do so amounted to a waiver on its part of the right to an appraisal, so that, as the trial judge remarks, both parties stand, so far as the present question is concerned, precisely as if no provision for arbitration had been in the policy. This is as far as any of the authorities cited by counsel go.

An unjustifiable refusal by the insured to enter into an arbitration on demand by the insurer, when it proximately results in damage to the latter by depriving him of some legal right, may doubtless defeat all right of action on the policy. For example, suppose, in this case, the property covered by the policy had been merely injured, but not destroyed, and the policy had given the defendant the right to take the goods at their appraised valuation, but before her offer to submit to arbitration the plaintiff had disposed of the goods, thus depriving the defendant of a valuable right, it would probably be held that the offer came too late; and that plaintiff's original refusal to arbitrate, coupled with her subsequent act in disposing of the goods, defeated any right of action on the policy. Such was the case of *Morley v. Liverpool*, 85 Mich. 210, 48 N. W. 502, cited by counsel. But in the present case there was no evidence that the defendant has, by reason of the delay, been deprived of any legal

right, or suffered any damage; not even the loss of evidence. So far as appears, it is in just as good a position to defend itself as to the amount of the loss as it was the day it demanded an appraisal. It is not particularly the length of the delay, but the prejudicial consequence of it, that is material. If the good faith of the plaintiff in at first refusing to submit to arbitration is material, the evidence justified the finding of the trial court that she believed and relied on the advice of her counsel that the defendant was not entitled to demand an appraisal, because there had been no failure to agree as to the amount of the loss, within the meaning of the policy.

3. The loss occurred December 21, 1897. According to the terms of the policy, it was payable within sixty days after the insured submitted proofs of loss. Proofs of loss were submitted December 30, 1897. Defendant's demand for a reference to ascertain the amount of the loss (which plaintiff refused to enter into) was made January 17, 1898. Plaintiff's offer to enter into such a reference (which defendant declined) was made late in August, 1898, the exact day not appearing. The court awarded interest on the amount of the loss from December 21, 1897, the day the loss occurred. This is assigned as error.

If the policy had provided, as many policies do, that the loss should be payable within sixty days after the submission of proofs of loss and the loss ascertained by the arbitrators, there would have been no doubt but that interest would not begin to run until the referees made their award, assuming that the defendant was not in default in delaying the award. But this is necessarily implied by the terms of the arbitration clause. Under the policy, defendant was entitled, in case of disagreement of the parties, to have the amount of the loss determined by arbitration, before it was required to pay it. This was a condition precedent to any right of action on the policy. Until an award was made determining the amount of the loss, the defendant would not be guilty of any default in not paying. Until then the amount which it should pay could not be ascertained. Interest by way of damages is allowed only on account of some default. In this case the delay until the last of August was wholly the fault of the plaintiff. But when the

defendant refused the offer of the plaintiff on that date it thereby waived its right to an arbitration, and the amount due on the policy became payable immediately, and interest should be allowed from that date only.

Plaintiff's counsel argues, however, that this point was not raised in the trial court, that that court has never passed upon it, and therefore it cannot be raised in this court. It may be true in fact that the attention of the court was not specifically called to the question. But the record does not show it. It was one of the questions which the court had to pass upon, and it has done so. It is not the first time that a trial court has been reversed upon a point not directly called to his attention.

The cause is remanded, with directions to the court below to modify its conclusions of law so as to allow plaintiff interest only from August 31, 1898, and to order judgment for the plaintiff upon the findings of fact and conclusions of law as thus amended. Neither party shall be entitled to any statutory costs.

STATE v. J. H. SOUTHALL.

July 14, 1899.

Nos. 11,706—(21).

Grand Larceny—Indictment.

In an indictment for statutory larceny (formerly designated as obtaining money, etc., by false pretenses), under G. S. 1894, § 6709, subd. 1, it is not necessary to use the exact words, "with intent to defraud." Equivalent language will suffice. An allegation that the defendant unlawfully, knowingly, etc., and with an intent to deprive the true owner of his property, by means, color, and aid of certain false writings and representations, then and there known to the defendant to be false, amounts to an allegation of an intent to defraud.

Time Check—Evidence.

The crime was alleged to have been committed in part by means of certain false writings called "time checks." Evidence that defendant had circulated other similar false time checks, which he knew to be

false, was competent, as tending to prove guilty knowledge and criminal intent in circulating the checks, by means of which the defendant committed the crime charged.

False Representation—False Writing.

The false representation need not be oral, where the crime is committed by means of false writings. Offering the paper for sale or as security for a loan of money may, of itself, amount to a false representation. Where the crime is committed by means of a false writing, it is not necessary that the writing is one which, if genuine, would be of legal validity.

Same.

Neither is it necessary that the false pretense or representation should be one which was calculated to deceive men of ordinary intelligence or business prudence. A false pretense or representation is to be weighed by its effect, and one calculated to deceive or defraud the weak and ignorant is as obnoxious to the law as one adapted to deceive the strong and intelligent.

Defendant was indicted in the district court for Ramsey county for grand larceny in the first degree. The case was tried before Brill, J., and a jury, which rendered a verdict of guilty; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

Nelson & Bramhall, for appellant.

W. B. Douglas, Attorney General, *Horace E. Bigelow*, County Attorney, and *F. W. Zollman*, Assistant County Attorney, for the State.

MITCHELL, J.

The defendant was indicted, tried, and convicted, under G. S. 1894, § 6709, subd. 1, of grand larceny in the first degree, committed by means which, prior to the adoption of the penal code, was designated as obtaining money, etc., by false pretenses. This subdivision, together with the preceding and closing parts of the section, which are applicable to both subdivisions, reads, so far as here material, as follows:

“A person who, with the intent to deprive or defraud the true owner of his property, or of the use and benefit thereof, or to appropriate the same to the use of the taker, or of any other person, either (1) Takes from the possession of the true owner, or of any

other person; or obtains from such possession by color or aid of fraudulent or false representation or pretense, or of any false token or writing; * * * any money, * * * Steals such property, and is guilty of larceny."

The first clause of subdivision 1 was evidently intended to apply to common-law larceny, and the second clause to what was designated as obtaining money, etc., by false pretenses. Subdivision 2 was intended to apply to what was designated as "embezzlement." Then the definition of "larceny," as applied to this case, would be as follows: "A person who, with intent to deprive or defraud the true owner of his property, obtains possession of it from the true owner by color or aid of fraudulent or false representation or pretense, or of any false token or writing, steals such property, and is guilty of larceny."

The indictment is too long to be quoted in full, but the most important part of it reads as follows:

"Did wrongfully, unlawfully and feloniously, and wilfully, knowingly and designedly, and with the intent then and there had and entertained by him the said J. H. Southall to deprive the true owner of his property, and by means, color, and aid of certain false writings and false and fraudulent pretenses and representations * * * obtain," etc.

The indictment also alleged that the defendant then and there well knew that, in truth and fact, said writings, pretenses, and representations were false and untrue.

The objection to the indictment is that it does not allege an intent to "defraud," which is of the essence of the crime charged. It is undoubtedly true that the words, "with intent to deprive" a person of his property, when standing alone, do not necessarily imply an "intent to defraud" him of it; but an intent, knowingly and designedly, to deprive him of it by means, color, and aid of false writings, and false and fraudulent pretenses and representations, known at the time to be false, necessarily involves and includes an intent to defraud. It is unnecessary to use in an indictment the precise words of the statute. Words that are equivalent to, and synonymous with, them are sufficient. If the allegations of the indictment are true, the defendant must have done what he did with intent to

defraud. The word "defraud," as used in this section, applies to its second subdivision as well as the first; but in *State v. Comings*, 54 Minn. 359, 56 N. W. 50, we held that the word was not necessary, in an indictment for larceny, under the former subdivision. The indictment is sufficient.

The defendant had formerly been, but was no longer, chief clerk in the United States engineer's office in St. Paul. The false writings by means of which the defendant is alleged to have committed the crime charged were what are termed "time checks," and were all alike, except dates, names and amounts, and were of the tenor following:

"United States Engineer Office, Army Building, St. Paul, Minn.
 _____ has been employed on the works for improving the Mississippi river during the month of _____; amount to pay, _____; amount advanced to him, _____; balance due, _____.
 J. H. Southall, Chief Clerk."

Indorsed:

"United States Engineer Office, Army Building, St. Paul, Minn.,

 This time check will be paid at this office _____ if presented in person or properly indorsed by _____.
 "J. H. Southall, Chief Clerk."

Evidence was admitted, over defendant's objection, tending to prove that he had issued numerous other time checks of the same tenor as those, by means of which he had committed the crime charged, and that he had admitted, in substance, that they were false and fraudulent, and that he knew that fact. It is claimed that this evidence was incompetent, on the ground that it tended to prove the commission by the defendant of crimes other than the one charged. The evidence was admissible, under the familiar rule that, when criminal intent or guilty knowledge in respect of the act is an element in the offense charged, evidence of other like acts of the accused, manifesting that intent or knowledge, is competent, notwithstanding it may establish the commission of another offense not charged. A common illustration of this is where a party is charged with circulating forged paper. Evidence that he circulated other forged paper is held admissible as tending to prove his guilty knowledge and criminal intent. This rule is peculiarly ap-

plicable in cases involving fraud, where a series of similar acts tend to show a regular system of fraud. The defendant's guilty knowledge and criminal intent were of the very essence of the crime charged. Evidence that he had circulated other false "time checks," with knowledge of their falsity, had a legitimate tendency to prove that he had guilty knowledge and a criminal intent in circulating the time checks, by means of which he defrauded Emmons, the complaining witness.

The court instructed the jury

"That the representation of these papers in themselves might be sufficient representation, without any oral declaration at all in regard to them, * * * a paper of this character may have been sold and purchased, under circumstances, without any oral declarations at all on the part of the seller, and yet a representation may be inferred without any oral representation,—any spoken words at the time."

This being an extempore oral instruction, its grammar may be subject to some criticism; but construing it as the court evidently meant, and as the jury under the circumstances must have understood it, and as defendant's counsel himself construes it, it was undoubtedly correct. The false pretense or representation need not be in words. The conduct and acts of the party may be sufficient, without any verbal assertion. 2 Wharton, Cr. Law (9th Ed.) § 1170; 2 Bishop, Cr. Law, § 430. The mere act of offering for sale, or as collateral security for the loan of money, forged or false paper, amounts, by implication, to an affirmation that it is genuine.

It is further urged, in this connection, that these time checks do not purport on their face to have been issued by the government, or that the persons therein named had performed work for the government, or that the government owed them anything; and, furthermore, that, even if they represented claims against the United States, they would be nonassignable, under R. S. (U. S.) § 3477.

We are not sure that we fully understand the point to which this is directed. If it means that these "time checks" did not constitute false tokens or pretenses because they are not such that, if genuine, they would be of any legal validity, then counsel has mistaken the rule in forgery for the rule applicable to obtaining prop-

erty by a false writing. *State v. Henn*, 39 Minn. 464, 40 N. W. 564. If, however, it means that it was so apparent from the face of the writing that it did not purport to represent a claim against the United States that nobody could have believed or relied on any representations that it was such a claim, then it is equally without merit. Coupled with the facts that the United States were employing men on works for improving the Mississippi river, and that those in the engineer's office in St. Paul had charge of the work, the representations contained in the checks themselves that they were executed at that office by the chief clerk therein, and were payable there, and were for work performed on the works for improving the Mississippi, might well be intended to be understood as a representation that the time checks did constitute a claim against the United States, and would be paid by the government, and would be so understood by those to whom the checks were offered for sale or as security. Perhaps a skilled lawyer, or a shrewd and experienced business man, would not have been deceived by any such false pretense or representation; but the statute is enacted for the protection of the entire community,—the weak and ignorant as well as the shrewd and the strong. A false pretense or token is to be weighed by its effects, and one calculated to mislead or defraud a weak mind is as obnoxious to the law as one adapted to deceive and defraud a strong one. 2 Bishop, *Crim. Law*, § 433.

There was no exception to that part of the charge which forms the subject of the eighth assignment of error; but, if there had been, we do not discover anything in it wherein the court transcended his duty in instructing the jury.

The request the refusal of which constitutes the ninth assignment of error was properly refused, for the reasons (1) that, in so far as it was good law, it was sufficiently covered by the general charge; and (2) because it was misleading, and did not fully or accurately state the law on the subject. Its meaning was also obscure and doubtful.

This covers all the points urged by counsel, and the result is that the order denying defendant's motion for a new trial is affirmed.

STATE ex rel. MINNEAPOLIS THRESHING-MACHINE COMPANY v.
DISTRICT COURT OF MEEKER COUNTY and Others.

July 14, 1899.

Nos. 11,742—(232).

Change of Venue—Laws 1895, c. 28.

Held, that if a defendant complies, or duly tenders compliance, with all of the provisions of Laws 1895, c. 28, as to change of venue, the place of trial of the action is ipso facto changed, and he is entitled to have the papers and files in the action transferred to the district court of the county of his residence. If the plaintiff desires to traverse the affidavits as to the defendant's residence, it must be by motion to remand, made in the county to which the venue has been changed.

Same—Retention of Case by Court—Mandamus.

If, in such case, the court of the county in which the venue was originally laid retains control of the papers and files of the action, denies a motion to strike the case from its calendar on the ground that the venue has not been changed, and sets the case for trial on a day certain, this court has original jurisdiction to issue to such court, and to the judges and clerk thereof, a writ of mandamus requiring a transfer of the action and the papers and files therein to the court of the county of defendant's residence.

Petition Sufficient.

Held, further, that the petition herein states facts sufficient to entitle the relator to such writ.

Application, by order to show cause, for a writ of peremptory mandamus requiring the district court for Meeker county, the Honorable Gorham Powers and the Honorable Gauthier E. Qvale, the judges of said court, and the clerk thereof, to transfer all the papers and files in the case of Peter E. Larson against Minneapolis Threshing-Machine Company to the district court for Hennepin county. Writ granted.

John M. Rees, for relator.

John T. Byrnes, *A. T. Nelson* and *M. C. Brady*, for respondents.

START, C. J.

This is an application, by order to show cause, for a peremptory

writ of mandamus, requiring the district court of the county of Meeker, and the judges and clerk thereof, to transfer all of the papers and files in the case of Peter E. Larson against the Minneapolis Threshing-Machine Company, originally commenced in the district court of Meeker county, to the district court of the county of Hennepin.

The respondents make the preliminary objection that the order which they are called upon to answer is not an order to show cause why a peremptory mandamus should not issue as provided by G. S. 1894, § 5985. The prayer of the petition, upon which the order was based, and which was served with it, is that a peremptory writ of mandamus issue. The order, although not technically correct, is, in substance, sufficient, taken in connection with the petition. The allegations of the petition are not denied by the respondents, but it is insisted on their behalf: First, that this court has no jurisdiction to issue the writ prayed for; second, if it has, the petition does not state facts sufficient to justify the issuance of the writ. A decision of these questions involves an examination of the admitted facts in this case as stated in the petition. They are, so far as here material, these:

On March 10, 1899, Peter E. Larson, as plaintiff, commenced an action against the relator, the Minneapolis Threshing-Machine Company, a corporation, in the district court of the county of Meeker, by serving a summons upon it at the city of Minneapolis. Thereupon, and on March 29, 1899, the relator, by its attorney, served a demand upon the attorney of the plaintiff in the action for a change of venue from the county of Meeker to the county of Hennepin, and at the same time served upon him an affidavit which, after stating the title of the action and venue, was in these words:

"John M. Rees, being duly sworn, upon oath says that he is the attorney for the defendant in the above-entitled action; that the place of business of the defendant, and its actual residence, and the residence of all of its officers, is now, and for more than one year prior to March 10, 1899, has been in the county of Hennepin and state of Minnesota; that on March 10, 1899, the summons and complaint in this action was served."

Then followed the signature and jurat. After the service of the demand and affidavit, and on the same day, the relator served its answer in the action. On April 13, 1899, the relator duly tendered to the clerk of the district court of the county of Meeker the demand and affidavit, with proof of the service thereof, for the purpose of having him officially file them in his office, change the venue of the action in accordance with the demand, and transfer all the papers and files in the action to the clerk of the court of the county of Hennepin. The fees of the clerk for such services were also duly tendered to him, which he refused to receive, and also refused to so receive and file the demand and affidavits, and transfer the papers and files in the action. The action was noticed for trial in the district court of the county of Meeker, and was placed upon the calendar of the court for trial by the plaintiff at a term thereof commencing on June 13, 1899.

The relator appeared specially, and moved the court to strike the case from the calendar on the ground that the place of trial had been changed from the county of Meeker to the county of Hennepin, and tendered proof of the making and service of the demand and affidavit. The relator, also, in open court, in presence of the presiding judge thereof, tendered to the clerk his fee, with the demand and affidavit, and proof of service thereof for filing, which was refused by the clerk. The presiding judge, however, suggested to the clerk that it was his duty to file all papers tendered. Thereupon the clerk did file the papers so tendered. But the court denied the relator's motion to strike the case from the calendar, and the presiding judge thereof, in open court, and in presence of the clerk, announced the decision of the court upon the motion to the effect that the place of trial of the action had not been changed from the county of Meeker to the county of Hennepin, and that the cause would be tried in the district court of the county of Meeker; and thereupon the court ordered the action to be tried in that court on July 11, 1899, and directed the jury to return on that day to try the action in question. Thereupon the relator applied to this court, and upon its petition, setting forth the foregoing facts, the order to show cause was issued.

1. The contention of the respondents is that this is, in effect, a

proceeding to secure a writ of mandamus against the clerk of the court, to compel him to perform a ministerial duty, and that this court, under the provisions of the statute, has no jurisdiction to issue the writ against him.

The statute (G. S. 1894, § 5985) provides that the supreme court shall have original jurisdiction to issue the writ only in cases where it is to be directed to a district court, or a judge thereof, in his official capacity. Hence, if this case is, as claimed, in effect a proceeding against the clerk alone, it may be conceded that this court has no jurisdiction in the premises. But such is not this case, for the district court, by the action of its presiding judge, has practically made the refusal of the clerk to transfer the records and files of the action its own refusal, and that of its judge in his official capacity. It now controls such records and files, and it has, by its decision that the venue of the action had not been changed, and by its order setting down the case for trial in Meeker county, in effect and substance directed the clerk not to transfer the papers and files. The clerk, having knowledge of such decision and order, cannot now transfer the papers and files, without an order of the court or judge thereof, without risk of being punished for contempt of court. On the other hand, all the court, or a judge thereof, has to do, in case a mandamus issues in this case, is simply to make an order that the clerk so transfer them. When the court made its decision and order, the clerk ceased to be an actual factor in the case; and he is not a necessary, although a proper, party to this proceeding, which is one, in effect, against the court and the judges thereof in their official capacity. Such being this case, the jurisdiction of this court is unquestioned. G. S. 1894, § 5985.

2. It is claimed that the facts stated in the petition are not sufficient to justify the issuance of the writ, because the relator has a legal remedy other than by mandamus. The statute (Laws 1895, c. 28) provides that:

"If the county designated for that purpose in the complaint is not the proper county, the action may notwithstanding be tried therein, unless the defendant before the time for answering expires demands in writing that the trial be had in the proper county, which demand shall be accompanied by an affidavit of the defendant, his attorney,

or agent, as to the actual residence of the defendant at the time of the commencement of the action and upon filing due proof of the service of such demand and affidavit upon the attorney of plaintiff in the office of the clerk of the district court in the county in which such action is commenced such action shall thereupon be transferred and the place of trial thereof changed to the county of which such defendant is a resident without any other steps or proceedings whatever. * * * When the place of trial is changed, all other proceedings shall be had in the county to which the place of trial is changed unless otherwise provided by the consent of the parties in writing duly filed, or order of the court, and the papers shall be filed or transferred accordingly."

The meaning of this statute is plain. If a defendant complies with its provisions, he has an absolute right to have the venue changed to the county of his alleged residence. The action cannot be retained in the county in which the venue was originally laid, for the purpose of traversing the allegations of the affidavit as to defendant's residence, or for the hearing of a motion to retain the case for the convenience of witnesses. If the plaintiff wishes to challenge the truth of the affidavit as to the defendant's residence, his remedy is to move the court in the county to which the venue is changed by the demand and affidavit to remand the case on the ground that the defendant is in fact a resident of the county in which the action was originally brought. If a defendant complies with this statute, and makes the demand and affidavit, and files them, with proof of service thereof, in the office of clerk of the court, the place of trial is ipso facto changed, and the defendant has an absolute right to have the papers and files transferred to the district court of the proper county. *Flowers v. Bartlett*, 66 Minn. 213, 68 N. W. 976.

Now, the relator, if its affidavit was sufficient, has done all in its power to secure its rights; yet the district court of the county of Meeker retains the case and the papers and files therein, and has set the case for trial. The only remedy the relator has, other than mandamus, is to appeal from the judgment, or perhaps from an order denying a new trial, after trial. *Carpenter v. Comfort*, 22 Minn. 539. Such a remedy is not adequate, because to secure it the defendant is obliged to abandon his case, and let the plaintiff proceed to judgment, and then appeal, thereby losing his opportunity

to make a defense on the merits in case the order is affirmed, or he must take part in what is in fact a moot trial, if it is decided on appeal that he had complied with the statute, and the venue was thereby changed. In such a case there is no more reason for denying him a remedy by mandamus than there would be to deny a writ of prohibition where it appeared *prima facie* that the court threatening to proceed had no jurisdiction at all to deal with the case, on the ground that there was a remedy by an appeal from the judgment. The other legal remedy which will defeat mandamus must be one which is reasonably efficient and adequate to reach the end intended, and actually compel the performance of the duty refused. 13 Enc. Pl. & Pr. 498. There is no question of discretion in this case. If the relator has complied, or tendered compliance, with the statute, he is entitled to have the action and the papers and files transferred to the proper county. He has no other adequate remedy, except by mandamus.

Lastly, it is claimed by the respondents that the affidavit as to the residence of the relator was not sufficient, in that it did not state that it did not have an office, agent, or place of business in Meeker county. G. S. 1894, § 5185, provides that

“A corporation shall be deemed to reside in any county where it has an office, agent, or place of business, within the meaning of this section.”

It is the contention of the respondents that if the relator had such office, agent, or place of business in the county of Meeker, it was a resident therein; hence, the affidavit should have negated the provision of this statute. It is not necessary to construe this statute, for it is not the one under which the relator proceeded in its attempts to secure the change of venue. The affidavit complies with the provisions of Laws 1895, c. 28, and is sufficient.

Let the writ issue.

STATE ex rel. JAY W. CRANE and Another v. CHAMBER OF
COMMERCE OF MINNEAPOLIS and Others.

July 17, 1899.

Nos. 11,712—(103).

**Certificate of Membership—Transfer—Bankruptcy of Holder—Discharge
from Unpaid Debts.**

The respondent corporation was organized to facilitate buying and selling of products, to inculcate principles of justice and equity in trade, and to facilitate speedy adjustment of business disputes among its members. It had no capital stock, but the price of a certificate of membership was \$1,000. The rules of the corporation provided that, after a proposed member was elected, he should pay that sum, or present a membership certificate, duly transferred to himself, and pay a transfer fee of \$15; that notice of a proposed transfer of such a certificate should be given the members by posting the same for 10 days, and, "if no objection shall have been made on account of any unsettled contracts, claims, demands, or complaints against the holder of such membership," it may be transferred, but, if there are objections, the board of directors shall, upon a hearing, determine the sufficiency of the same. A member was adjudged a bankrupt in the United States district court, and was, by order of the court, discharged from his debts. His trustee in bankruptcy sold his certificate to a person who was duly elected a member of the corporation, and who presented the certificate, and tendered the \$15 fee. Notice of the proposed transfer of the certificate was posted. Two members who held claims against the bankrupt, which were barred by the order discharging him from his debts, objected to the transfer, because such debts were not paid. *Held*, the debts so barred gave the objectors no standing to make the objection, and a writ of mandamus will lie to compel the corporation to transfer the certificate.

Alternative writ of mandamus issued by the district court for Hennepin county requiring defendants Chamber of Commerce and its president and secretary to transfer to relator Robbins a certain certificate of membership or to show cause why they had not done so. The case was tried before Elliott, J., who found in favor of defendants; and from an order quashing the writ, relators appealed. Reversed.

Charles R. Fowler, for appellants.

Rule 12, as applied to transfers of membership, is void for uncertainty, ambiguity, and indefiniteness, and as being unreasonable, vexatious, and oppressive. A by-law must be free from ambiguity, and afford complete protection to those who are to obey it. 1 Beach, Priv. Corp. § 308. The usage of the chamber in construing the by-law was not binding. *Manson v. Grand Lodge A. O. U. W.*, 30 Minn. 509. The rule, as construed by defendants and by the court, is void as against public policy and an unlawful restriction on the alienation of personal property. Property is the right of dominion, possession, and power of disposition. *Braceville v. People*, 147 Ill. 66; 23 Am. & Eng. Enc. 637. Whatever rights in property a man has are alienable. *Gray, Restr. Alien.* § 166. A by-law restricting alienation is void as in restraint of trade. *Moore v. Bank*, 52 Mo. 377. See *People v. Fire Department*, 31 Mich. 458; *Morse v. Blood*, 68 Minn. 442; *Albers v. Merchants*, 39 Mo. App. 583, 598. Membership is property, and passes to a trustee in bankruptcy, subject only to the conditions and restrictions attaching to it in the hands of the bankrupt. *In re Ketchum*, 1 Fed. 840; *Hyde v. Woods*, 94 U. S. 523; *In re Warder*, 10 Fed. 275. The law discountenances all attempts by corporations to prevent sale and transfer of stock. 1 Cook, Stock & Stockh. § 408; *Baldwin v. Canfield*, 26 Minn. 43; *Sargent v. Franklin*, 8 Pick. 90; *Driscoll v. West*, 36 N. Y. Sup. Ct. 488; *Farmers v. Wasson*, 48 Iowa, 336.

As construed by defendants and the court, the rule is ultra vires. *Albers v. Merchants*, supra; *People v. New York*, 149 N. Y. 401, 411; *Haebler v. New York*, 149 N. Y. 414, 428; *Rochester Ins. Co. v. Martin*, 13 Minn. 54 (59); *Thomas v. Railroad Co.*, 101 U. S. 71, 82; *People v. Chicago*, 170 Ill. 556; *Kolff v. St. Paul F. Ex.*, 48 Minn. 215; *Bergman v. St. Paul M. B. Assn.*, 29 Minn. 275, 278; *Bisbee, Law Prod. Ex.* § 48. The directors had no jurisdiction to pass on the objections to membership. No conduct contrary to principles of justice and equity in trade was charged. *In re Haebler*, 15 Misc. (N. Y.) 42; *People v. New York*, supra; *Haebler v. New York*, supra; *People v. New York*, 8 Hun, 216, 219. No debt or claim existed on which to base objection. The debt was barred. *St. Anthony Falls W. P. Co. v. Greely*, 11 Minn. 225 (321); *Trebby v. Simmons*, 38 Minn.

508; *Humphrey v. Carpenter*, 39 Minn. 115; *In re Doty*, 16 N. B. R. 202. There can be no estoppel when the directors were acting without the corporate powers. *People v. Chicago*, *supra*; *Greene v. Board*, 174 Ill. 585; *People v. New York*, *supra*; *Ryan v. Cudahy*, 157 Ill. 108, 118; *State v. Milwaukee*, 47 Wis. 670, 680. See *Ex parte Saffery*, L. R. 4 Ch. D. 555, 561.

Wilson & Van Derlip, for respondents.

The Chamber of Commerce has power to prescribe conditions of membership. G. S. 1894, § 2983, subd. 5. The enactment of the rule in question is within the express terms of the statute. *Brent v. President & Directors of Bank*, 10 Pet. 596; *Pitcher v. Board*, 121 Ill. 412; 23 Am. & Eng. Enc. 769; *People v. Board*, 45 Ill. 112; *Thompson v. Adams*, 93 Pa. St. 55; *Board v. Nelson*, 162 Ill. 431; *Com. v. Union*, 135 Pa. St. 301. Such associations have of necessity the right to attach to membership such conditions as may be deemed proper to carry out the purposes of their organization. *Board v. Nelson*, *supra*. Such by-laws are valid, if any object of the association is promoted thereby. *People v. Board*, *supra*; *State v. Milwaukee*, 47 Wis. 670; *Morawetz, Corp.* § 494; *Com. v. Union*, *supra*; *People v. New York*, 149 N. Y. 401. The rules and regulations become the terms or rights of membership. *Hyde v. Woods*, 94 U. S. 523. See also *Board v. Nelson*, *supra*; *Brent v. President & Directors of Bank*, *supra*; *Belton v. Hatch*, 109 N. Y. 593; *Powell v. Waldron*, 89 N. Y. 328; *Platt v. Jones*, 96 N. Y. 24; *Londheim v. White*, 67 How. Pr. 467; *Ritterband v. Baggett*, 4 Abb. Pr. (N. C.) 67; 1 *Thompson, Corp.* § 955; 5 Am. & Eng. Enc. (2d Ed.) 88. Such associations have inherent power by rules or by-laws to disfranchise or expel members. 23 Am. & Eng. Enc. 759, note 2. The members of the stock exchange may agree to be governed by such rules as they think proper, not in conflict with the law of the land; and for a violation of such rules may suspend or expel a member, after a fair and orderly hearing, according to the constitution and by-laws. 23 Am. & Eng. Enc. 761, note 1; *Matthews v. Associated*, 136 N. Y. 333; *People v. New York*, 149 N. Y. 401; *Haebler v. New York*, 149 N. Y. 414; *Lafond v. Deems*, 81 N. Y. 507; *Com. v. Union*, *supra*. There is no difference between in-

corporated and unincorporated associations in this respect. 4 Am. & Eng. Enc. (2d Ed.) 595; Board *v.* Nelson, *supra*; People *v.* Board, 80 Ill. 134.

One accepting membership accepts it subject to all the conditions thereof. Belton *v.* Hatch, *supra*; 23 Am. & Eng. Enc. 768, 769; Powell *v.* Waldron, *supra*; Hyde *v.* Woods, *supra*; White *v.* Brownell, 3 Abb. Pr. (N. S.) 318, 4 Abb. Pr. (N. S.) 162; 5 Am. & Eng. Enc. (2d Ed.) 100; Com. *v.* Union, *supra*; Greene *v.* Board, 63 Ill. App. 446; Haebler *v.* New York, *supra*; 1 Thompson, Corp. § 941; 23 Am. & Eng. Enc. 767; Lewis *v.* Wilson, 50 Hun, 166. Such member is conclusively presumed to know and to accept the rules. White *v.* Brownell, *supra*; Board *v.* Nelson, *supra*; Haebler *v.* New York, *supra*; O'Brien *v.* Grant, 146 N. Y. 163; Belton *v.* Hatch, *supra*; Weston *v.* Ives, 97 N. Y. 222; Com. *v.* Union, *supra*; People *v.* Board, 45 Ill. 112. Where the rules provide for a body to pass on and enforce the conditions of membership, its finding is conclusive. 23 Am. & Eng. Enc. 763; White *v.* Brownell, *supra*; Lewis *v.* Wilson, *supra*; Thompson *v.* Adams, *supra*; Greene *v.* Board, *supra*. The discretion of the court cannot be substituted. Nichols *v.* Eaton, 91 U. S. 716; Pitcher *v.* Board, *supra*; Board *v.* Nelson, *supra*; Com. *v.* Union, *supra*; Haebler *v.* New York, *supra*; People *v.* New York, *supra*. Such boards are not bound by the rules of courts. If the investigation be *bona fide*, and after opportunity to be heard, it is conclusive. Brent *v.* President & Directors of Bank, *supra*; Hutchinson *v.* Lawrence, 67 How. Pr. 38, 53; Board *v.* Nelson, *supra*; Vaughn *v.* Herndon, 91 Tenn. 64; Hurst *v.* New York, 100 N. Y. 605; Lewis *v.* Wilson, *supra*; Com. *v.* Union, *supra*. Such determinations are analogous to awards by tribunals of the parties' own choosing. 23 Am. & Eng. Enc. 763, note 2; Board *v.* Nelson, *supra*; Com. *v.* Union, *supra*. Courts are restricted to the question of the jurisdiction of such boards under rules or by-laws legally enacted, and cannot inquire into the merits of a matter decided by them. 23 Am. & Eng. Enc. 763, 764, 773; Pitcher *v.* Board, *supra*; Gregg *v.* Massachusetts, 111 Mass. 185; Barrows *v.* Massachusetts, 12 Cush. 402; Lewis *v.* Wilson, *supra*; State *v.* Milwaukee, *supra*; Board *v.* Nelson, *supra*; Vaughn *v.* Herndon, *supra*; Appeal of Sperry, 116

Pa. St. 391; *Ryan v. Cudahy*, 157 Ill. 108; *Com. v. Union*, *supra*; *White v. Brownell*, *supra*.

Rules of an association like defendant, giving its members a preference or advantage over nonmembers do not conflict with, and are not affected by, bankruptcy or similar acts. *Hyde v. Woods*, *supra*; *O'Brien v. Grant*, *supra*; 23 Am. & Eng. Enc. 769, 771, 772; *Belton v. Hatch*, *supra*. The proceedings in this case were regular. The application to transfer was made by Crane, who would be in law the applicant referred to in the rule. *Platt v. Jones*, *supra*; *Belton v. Hatch*, *supra*. By appearing before the board, relators waived any irregularity in the constitution of the board or its mode of procedure. *Pitcher v. Board*, *supra*; *Haebler v. New York*, *supra*.

Notwithstanding the discharge in bankruptcy, the board was authorized to pass on any objection on account of any unsettled contract, claim, demand, or complaint against the holder of the membership. The discharge was at most a bar to enforcement of the obligation, so as to affect the remedy. *Brent v. President & Directors of Bank*, *supra*; *In re Burton*, 29 Fed. 637, 639. A state court does not lose jurisdiction because of the discharge, and unless the bankrupt pleads his discharge judgment may be rendered against him. *Manwarring v. Kouns*, 35 Tex. 171; *Seymour v. Browning*, 17 Oh. St. 362; *Steward v. Green*, 11 Paige, 535; *Fellows v. Hall*, 3 McLean, 281; *Horner v. Spelman*, 78 Ill. 206; *Dig. Fed. Cas. Column 484*, § 634; *Hyde v. Woods*, *supra*. After discharge the moral obligation remains. *Lambert v. Schmalz*, 118 Cal. 33; *Mutual Reserve Fund Life Assn. v. Beatty*, 93 Fed. 747. Hence, the chamber having been established to inculcate principles of justice and equity between its members, it was competent for the board to declare the unsettled contract a sufficient objection. *Hurst v. New York*, *supra*.

CANTY, J.

On August 29, 1898, one Thayer was a member of the Chamber of Commerce of Minneapolis. On that day he was adjudged a bankrupt by the United States district court of the district of Minnesota, and the relator Crane was duly appointed his trustee in bankruptcy. By order of that court made November 12, 1898, Thayer was dis-

charged from all his debts existing on the former date. A part of the assets of Thayer which came into the possession of Crane, as such trustee, was the certificate of membership of Thayer in the Chamber of Commerce. Crane sold this certificate to the relator Robbins, and agreed to procure a transfer of it to him on the books of the Chamber of Commerce. The latter refused to transfer the certificate to Robbins, and he and Thayer sued out a writ of mandamus to compel the Chamber of Commerce to do so. On the trial, the court quashed the writ, and the relators appealed.

The Chamber of Commerce is a corporation organized under the laws of this state. It was organized for the following purposes, as stated in its articles of incorporation:

"To facilitate the buying and selling of all products, to inculcate principles of justice and equity in trade, to facilitate speedy adjustments of business disputes, to acquire and disseminate valuable commercial information, and, generally, to secure to its members the benefits of co-operation in the furtherance of their legitimate business pursuits, and to advance the general prosperity and business interests of the city of Minneapolis."

The corporation has no capital stock, but each member, on being admitted, receives a certificate of membership. The rules of the corporation provide that its president shall annually appoint a committee of five, to serve one year, to be known as the "committee on membership," whose duty it shall be to examine all applicants for membership. It further provided:

"A majority of said committee being satisfied that such applicant should be admitted as a member, the name of said applicant shall be placed on the bulletin board of the exchange room at least three days prior to being balloted for by the board of directors. Such applicant may be admitted to membership in this association upon approval, by at least seven affirmative ballot votes, of the board of directors; and upon signing an agreement to be governed by the charter, rules, and by-laws of the Chamber of Commerce, and paying the annual or other assessment then due, or on presentation of a membership duly transferred, and paying a transfer fee of \$15.
* * * Before any membership can be transferred, under the provisions of this rule, notice of or application for such transfer shall have been posted upon the bulletin of the exchange rooms for at least 10 days; when, if no objection shall have been made on account of any unsettled contracts, claims, demands, or complaints

against the holder of such membership, it shall thereupon be assumed that the membership is unimpaired; and, after transfer of a membership, no subsequent complaint, claim, or demand against the former holder shall impair such membership so transferred and in the hands of an innocent party. The notice or application for transfer shall state the name of the person to whom it is proposed to be made. Objections to the transfer must be in writing, signed by the party objecting, and filed with the secretary, and the party objecting shall also, on the day of filing the same, serve a copy of his objections upon the applicant for transfer. The board of directors shall, upon hearing the parties, determine the sufficiency of such objections. In case any membership shall be transferred in violation of any of the foregoing provisions, such transfer shall be null and void. If any member of this association shall desire to purchase a membership from another member of the association, the purchaser may present to the secretary, at his office, the certificate purchased, and, at the request of the purchaser, the secretary shall cause to be posted in the exchange room, for 10 business days, a notice of the said sale and proposed transfer. After the expiration of said 10 days, if no objection to the sale and transfer has been filed in the secretary's office, he may transfer the membership to the purchaser on the books of the association, and issue a certificate to him, cancelling the certificate surrendered, without the payment of transfer fee. Should the party to whom the membership has been transferred, at any time desire to transfer the membership to a nonmember of the association, with the intent of his becoming a member, the party, on becoming a member, shall pay the regular transfer fee of \$15 to the association. No member of the association shall be entitled to more than one vote, at any election, on any question that may come before the association, regardless of the number of memberships he may own. In case objections are made to the transfer of any membership under this section, the same rules shall govern the proceedings as are made in this section governing the regular transfer of memberships."

No person can become a member of the corporation without paying a membership fee of \$1,000, or procuring the transfer to himself of a certificate of membership and paying a fee of \$15.

Robbins was duly elected a member in the manner provided by these rules. The certificate of membership of Thayer was duly presented to the proper officers of the corporation, to be transferred by them from Thayer to Robbins. Notice of the application for such transfer was duly posted for more than 10 days on the bulletin of the exchange room of the corporation. Thereupon two objections to the transfer were duly filed and served by members of the cor-

poration. One objection was made by L. T. & H. P. Watson, on the ground that they had a claim against Thayer for the sum of \$191.88, and the other objection was made by one Jolley, on the ground that he had a claim against Thayer for the sum of \$123.63. The board of directors heard the parties on these objections, and determined that they were sufficient to prevent the transfer of the certificate of membership to Robbins, and refused to make the transfer. This is the sole reason why the transfer was refused. It was stipulated in the court below that at the time Thayer was adjudged a bankrupt, August 29, 1898, he was indebted to the objectors in the amounts, respectively, stated by them; that he duly scheduled these debts in the bankruptcy proceedings, in his list of his creditors whose claims were unsecured; and it is conceded that he was discharged from these debts by the order of discharge aforesaid.

In our opinion, there is but one question in this case, and that is whether the objectors had any standing to object to the transfer of the certificate after their debts were barred by the discharge in bankruptcy of the debtor.

It was stipulated on the trial that the case should be tried on the return to the writ and on the additional facts stated in the stipulation. Respondent alleges in its return, and the court finds, that the board of directors, in passing on the question, were not required to observe technical rules of law, but are authorized to render decisions in matters coming before them with a view to compelling honest, just, and equitable conduct on the part of its members, and that the decision of the board is final and conclusive. Respondent lays stress on these alleged findings, but we regard them as mere conclusions of law. After the debts due to the objectors were barred by the discharge in bankruptcy, they had, in our opinion, no standing as objectors. There is nothing in the articles of incorporation, rules, or by-laws which gave these objectors a lien on the certificate of Thayer for the payment of any debts which he might owe them. If they had such a lien, it may be conceded that it would not be dissolved by the discharge in bankruptcy, and the case would then be similar to *Hyde v. Woods*, 94 U. S. 523, cited by respondent. But the objectors had no such lien. The only way in which they could ever appropriate this certificate to the pay-

ment of the debts due them was by resorting to the personal liability of Thayer, and obtaining a personal judgment against him, and then, either through supplemental proceedings or execution, the certificate could be disposed of, and the proceeds applied to the payment of the judgment. If the objectors had a right to resort to such personal liability, the right to object to the transfer by him of the certificate might indirectly be of considerable benefit to them, as it might, perhaps, have the effect of making them preferred creditors. But they cannot resort to such personal liability. That remedy is barred by the discharge in bankruptcy, and there is now no way in which they can appropriate this certificate to the payment of the debts which he owed them. Then this certificate cannot be appropriated to the payment of the debts due from the bankrupt to his fellow members, and the corporation holds that it cannot be appropriated to the payment of the debts due from him to any one else.

Does not the position of the corporation amount to this: that the certificate cannot be appropriated to the payment of his debts at all, and he may enjoy the benefit of it and remain a member all his life? Such a certificate is a species of property. 23 Am. & Eng. Enc. 768; *Hyde v. Woods*, *supra*. True, the member has only a qualified ownership in his certificate. But in this case all of the conditions attached to the right to assign the certificate have been complied with except one. That condition is, in effect, that the certificate shall not be appropriated to the payment of the member's debts. In our opinion, such a condition is against public policy and void. Then the construction which respondent has put upon its own rules leads to this result. It may be that the better construction is that it was never intended by the rules to give a member a right to make such an objection after the debt on which he bases his objection was barred by a discharge in bankruptcy. But we need not decide this point. Whichever construction is adopted, the result is the same,—the order appealed from must be reversed.

Order reversed, and case remanded to the court below, with directions to enter judgment for relators in conformity with this opinion.

STATE v. ROBERT P. LEWIS COMPANY.

July 17, 1899.

Nos. 11,727—(229).

Taxes—Assessment for Water.

In a proceeding to enforce, against unplatted land, a frontage assessment for a water main, *held*, the court below proceeded in the manner directed in the former opinion herein (see 72 Minn. 87) in reducing the assessment on account of deductions which should be made for cross streets if the land had been platted, and the result is as favorable to the defendant as it could rightfully ask.

Same—Former Decision.

Held, the other questions certified were disposed of in the former opinion, and have become the law of the case.

Point Certified—Practice.

In certifying the proceeding to this court, under G. S. 1894, § 1589, the court below, in the recitals in its certificate, states that a certain point was raised in that court, and then certifies to this court three other questions, separately numbered, but does not so certify said first-named point. *Held*, it has not been sufficiently certified, and this court will not pass upon it.

In proceedings in the district court for Ramsey county to enforce delinquent taxes on real estate, defendant interposed an answer, and the matter was tried before Otis, J., who made findings of fact and conclusions of law, and at request of defendant certified to the supreme court for its determination the questions referred to in the opinion. Affirmed.

James E. Markham and *Carl Taylor*, for plaintiff.

Daniel W. Doty, for defendant.

CANTY, J.

This is the third time this proceeding has been certified to this court. Most of the facts are stated in the opinion rendered on the second certification. See 70 Minn. 202, 72 N. W. 962, and 72 Minn. 87, 75 N. W. 108. On that hearing the case was remanded to the court below, with directions "to reduce the assessment by making proper allowances for streets which would necessarily be laid out

over and across the land, and intersect both Dale and Front streets, if the same were platted."

Thereupon the court below, on a further hearing, deducted 36 feet from the 630 feet of frontage on Front street, leaving 594 feet frontage to be taxed on that street; and from the total of 2,580 feet frontage on Dale street the court made the following deductions: Railroad right of way, 200 feet; seven cross streets, each 60 feet wide, 420 feet; six alleys, each 20 feet wide, 120 feet; first 150 feet north of Front street, deducted by the water board on the original assessment, 150 feet; total deduction, 890 feet; balance of frontage on Dale street so assessed, 1,690 feet. This provides for blocks of the width on Dale street of only 270 feet between the cross streets, with an alley 20 feet wide in each block, leaving only 250 feet of frontage to be assessed in each block. This is certainly as favorable to defendant as it can rightfully claim, under the rules laid down in the former opinion, and this disposes of the second question certified to this court.

2. The other two questions certified to this court were disposed of in said former opinion, which has become the law of the case.

3. Defendant insists on raising the question whether or not the law on which this assessment was made is in conflict with the constitution of the United States, but that question has not been certified up to us. True, the court, by way of recital, states that that question was raised in the court below, but the statement winds up by certifying three separately numbered questions to this court, and that question is not so certified. Even if it could be spelled out of the recitals in the certificate that the court below desired this court to pass upon that question, it would not, under the circumstances, be fair to the opposite party to do so. When the court, at defendant's request, undertook to state and number separately the questions to be certified to this court, all of the questions intended to be certified should be put in the same category. Any other practice will be misleading, and result in confusion.

The order of the court below is affirmed.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY v.
WILLIAM GEORGE and Others.

July 25, 1899.

Nos. 11,668—(209).

77 319
82 491**Mortgage—Cold-Storage Plant—Removal of Apparatus.**

A building, subject to a mortgage as part of the real estate, being constructed and used for cold-storage purposes, the natural system of refrigeration being in use, the owner or mortgagor in possession made a contract (to which the mortgagee was not a party) with H., by which the latter was to put, and did put, into the building, for an agreed price of over \$12,000, a plant or apparatus for a system of artificial refrigeration; the same to remain the personal property of H., and the title not to pass until paid for. In putting in the new apparatus, the drip pans and cold-air pipes used in connection with the old natural system of refrigeration were removed, and certain other minor changes made in the building. All the apparatus pertaining to the new artificial system of refrigeration can be removed without material injury to the building or the apparatus, but, if removed, the building cannot be used for cold-storage purposes without putting in another apparatus for artificial refrigeration, or restoring the old natural system. The latter could be done at a cost of \$1,700 or \$1,800. But the artificial systems of refrigeration are more satisfactory than the natural system, and are coming into general use, to the exclusion of the natural system formerly in use in the building. If the present apparatus should be taken out, the building would be in condition for putting in another like system, or, with certain necessary changes (the extent of which does not appear), any other mechanical system for refrigerating. In view of these facts, it does not appear, and there is no finding, that, if the present apparatus should be removed, the building would be worth any less for cold-storage purposes than it would have been had the changes never been made, and the natural system remained intact. The apparatus has not been paid for. *Held*, that the trial court was right in holding, as between the mortgagee and H., or assigns, that the apparatus for artificial refrigeration did not become a part of the realty, or subject to the lien of the mortgage, but might be removed.

Action in the district court for Ramsey county to enjoin defendants from removing a refrigerating plant from a building covered by plaintiff's mortgage. The case was tried before Brill, J., who

found in favor of defendants; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Edmund S. Durment, for appellant.

Morphy, Ewing & Gilbert and Theodore Worcester, for respondents.

BUCK, J.

On October 6, 1892, one William H. Patterson was the owner of the real estate described in the complaint, and in the possession thereof, and he then borrowed of this plaintiff \$50,000, and promised to repay plaintiff the same on October 6, 1897, with interest thereon at the rate of 5½ per cent. per annum; and, to secure the payment of said principal sum and interest, he then duly executed a mortgage to plaintiff on said premises, which mortgage was on October 10, 1892, duly recorded in the office of the register of deeds of Ramsey county, wherein said premises are situate. On said last-named day, Patterson duly conveyed said real estate to the Thurston Cold Storage Company, subject to said mortgage; and said company forthwith went into possession of said premises, and continued in possession thereof until the year 1897, when it became insolvent, and made an assignment of all its property for the benefit of its creditors, and it has been ever since, and still is, insolvent.

At the time of making said loan and the execution of said mortgage there was, and at all times since there has been, situated upon said real estate, a large brick building, which had been built and arranged to be used as a cold-storage warehouse, and which then and now constitutes a considerable part of the value of said premises, and, if not used for the purposes of a cold-storage warehouse, is of considerably less value than if so used. At and prior to the execution of said mortgage the business of cold storage was carried on in said building under the natural system of refrigeration, and said building was arranged so that the cold air necessary to keep the temperature in the various rooms in said building at the proper stage was largely furnished from natural ice stored in the upper part of said building, and the air was conducted to various portions of said building through certain flues built in or upon the walls of said building, and extending through the floors, and in some part was furnished by packing ice and salt in flues or tubes

built in said building for that purpose. Shortly after the execution of said mortgage, and in the fall and winter of 1892, the Thurston Company changed a portion of said building from the natural to an artificial system of refrigeration, known as the "brine system," in which cold is generated by means of machinery consisting of an engine, compressor, tank, and pipes, and the use of ammonia and brine forced through pipes into coils placed in rooms where needed; and in making said change the Thurston Company placed in said building appropriate machinery, called a "Fifteen-ton plant." Thereafter the business of said cold storage was carried on in said building by the Thurston Company partly by the natural and partly by the artificial system of refrigeration, until the installation of the 60-ton apparatus now in controversy.

It appeared that on March 22, 1895, the Hercules Ice-Machine Company made an agreement in writing with the Thurston Company whereby the former company would construct for and deliver to the latter company on said premises by May 1, 1895, a complete 60-ton refrigerating apparatus, for the sum of \$12,327, payable in various sums and at different intervals,—the first payment due January 10, 1896, and the last one due January 10, 1898,—evidenced by several notes. This agreement provided that the title and ownership of the 60-ton plant and its appurtenances should remain in the Hercules Ice-Machine Company until paid for; nor was the title to said plant to vest in the Thurston Company until the apparatus proved satisfactory to the latter company, nor until it accepted said apparatus or plant. Pursuant to said agreement, the Hercules Company furnished and put into said building said 60-ton refrigerating apparatus, the work upon the same being closed some time later than May 1, 1895 (the exact time not appearing); and said Thurston Company, at the request of said Hercules Company, executed and delivered to it the notes provided for in the agreement,—a portion of them prior to, and a portion after, May 1, 1895. None of said notes, nor the purchase price of said apparatus, was ever paid. On April 27, 1895, the Hercules Company, for value, executed and delivered to the Old Second National Bank of Aurora, Illinois, all its interest in said agreement, including sums due and to become due, and the notes given for the purchase price of said machinery,

including the right to remove said apparatus or machinery from said building in case of default of payment on the part of said Thurston Company, as provided in said agreement. Subsequently, and on March 18, 1896, said bank, for value, executed and delivered to the defendant William George all its rights in said agreement and the money due or to become due thereon, and the purchase-money notes, and the right to remove said machinery as provided in said contract.

Thereafter, and in March, 1896, the defendant William George entered into an agreement with the Thurston Cold-Storage Warehouse Company, wherein was recited the fact that said Hercules Ice-Machine Company had placed this 60-ton refrigerating plant in said warehouse building, and that said Thurston Company had given notes therefor, and that no part thereof had been paid, and that said Thurston Company had never accepted said refrigerating plant, and had paid no consideration therefor, and that said George had purchased all of said Hercules Company's rights in said contract and plant, and was the owner of said notes, and that differences and controversies relating to the performance of said contract by the Hercules Ice-Machine Company and the Thurston Company had arisen; and whereas, it was understood that the title of said refrigerating Ice-Machine Company had never been divested out of the Hercules Ice-Machine Company or its assignees by virtue of anything done under said original agreement, it was therefore agreed that said George lease to said Thurston Company the said 60-ton plant for the term of two years from May 1, 1896, to be used by it as a refrigerating plant in said cold-storage building, and not elsewhere, for a rental of \$75 per month, with the privilege on the part of the Thurston Company, on or before the termination of said lease, of purchasing said plant by paying therefor the sum of \$9,663.50, for which three notes were given, payable on or before May 1, 1898, with interest from May 1, 1896. The lease also contained a provision that, if there was a default in the rental payments, the lessor might enter upon the premises and take full and absolute possession of said refrigerating plant and machinery, and remove the same, and that title and ownership should remain in said George until the agreement was consummated by the purchase of said

plant. This agreement was filed in the office of the city clerk of the city of St. Paul April 25, 1896.

Upon this agreement or lease the Thurston Company paid rental to the amount of \$675, and no more, and no part of the three notes has been paid. The defendant George, by reason of the default in the terms of the lease, commenced an action of claim and delivery to recover the 60-ton plant, but before doing so tendered to the Thurston Company and to the St. Paul Cold-Storage & Warehouse Company said notes; the latter company having succeeded to all the former's rights in and to said plant, and being in possession of and operating the same.

As George was claiming title to the 60-ton plant put in by the Hercules Company, and was about to remove the same, the plaintiff, as mortgagee, brought this action to restrain such removal, and to have its mortgage adjudged a lien thereon. The contest is really between plaintiff and the defendant George; the latter claiming that he had acquired rights under the Hercules Company contract, which gave him title to the plant, and that, as there was default in the contract or lease made by him with the Thurston Company, he had a right to recover and retain possession of the property as his own, and also that the natural ice system of refrigeration had become obsolete. On trial the court decided in his favor, and adversely to that of plaintiff.

The mortgagor is insolvent, and the security inadequate, either with or without the machinery. Exclusive of the machinery, the value of the building at the commencement of this action was \$25,000. The appellant contends that the Hercules contract was a chattel mortgage; and the respondent contends that it was a conditional sale, and that under its terms, and the subsequent assignment to the bank, and by it to George, the latter had the right to remove the machinery without the consent of the mortgagee. We agree with the contention of the respondent that it was a conditional sale, and that the title to the machinery did not pass to the Thurston Company under the agreement.

One of the rules for determining whether a contract is a conditional sale is the intent of the parties, and another rule is this: When the vendor is to do anything to the property in order to put

it into the state in which the vendee is bound to accept it, the doing of that thing is a condition precedent to the vesting of the property. Anderson, Law Dict. 19. It is seldom that a contract comes so clearly within the definition of what constitutes a conditional sale as the one at bar. (1) It was expressly agreed that the title and ownership of the apparatus and appurtenances should remain in the Hercules Ice-Machine Company until each payment was fully made, and the giving of notes was not to be deemed payment, until they were actually paid. (2) The Hercules Company guarantied that the machinery and apparatus would accomplish certain results set forth in the specifications forming part of the contract, and the Thurston Company was not to accept the machinery until such results were accomplished. (3) The results guarantied and contemplated by both parties were never accomplished to the satisfaction of the Thurston Company, and it never accepted the machinery and never paid for it.

It would be difficult to find another contract so lacking in the essential elements which constitute the passing of the title. There was no intent that the title should be considered as passed under these conditions, and none did pass; and, to hold otherwise, we should be making a contract for the parties never contemplated by them, and not warranted by the facts. In other words, this court would thus be passing title to the property, when each party had expressly agreed that it had not passed. Nor did any title to the machinery pass to the St. Paul Cold-Storage & Warehouse Company by virtue of the lease or contract made by it with the defendant George. This instrument was in part a lease, and in part a contract to sell in the future on certain conditions. It was not a sale in presenti, to be completed or defeated by the performance or nonperformance of certain conditions; but a mere agreement to sell in the future, upon certain conditions, none of which were performed. This agreement to sell in the future did not pass any title at the time when it was made, and certainly none passed afterwards; and the St. Paul Cold-Storage & Warehouse Company, as owner of the building, had no conveyable title in the machinery, so as to render it subject to the lien of the plaintiff's mortgage, and thus defeat the rights of the defendant George in such machinery,

and it could have no such title to vest in another until it had performed the conditions of the agreement with George.

The title to the property, then, not having been divested by the terms of the contract, nor by the performance of the terms thereof, as between the parties, the question arises as to the rights of the plaintiff mortgagee as against the rights of the defendant George, the assignee of the rights of the Hercules Ice-Machine Company. Appellant claims that George cannot legally remove the machinery without consent of the mortgagee. Why not? It was not there when plaintiff loaned its money and took security on the premises for its repayment. It was not there when the 15-ton plant was installed in place of the natural refrigerating system. It was not installed in the building until several years after the date of the mortgagee's loan on the premises. It parted with no security or consideration on the faith that this 60-ton plant would be installed or remain there. It is not an innocent holder of a mortgage, taken without notice, upon land to which the owner had affixed property, personal in its character, before the execution of the mortgage. It has no equities which it can invoke in its favor, for the installation of the 15-ton plant added materially to the value of the security which it took when it loaned the money to Patterson in the first instance.

The question, then, is purely one of law, viz., which has the superior rights, the plaintiff or the defendant George? At the time the 60-ton plant was installed in the building, the Thurston Company owned the premises, and by the terms of the contract the Hercules Company reserved the right to remove the machinery in case of nonpayment of the purchase money. There is no pretense that such money has been paid, and there is no contention but that the Thurston Company agreed that the Hercules Company might remove the property in case of nonpayment of the purchase price of the machinery. In the case of *Merchants Nat. Bank v. Stanton*, 55 Minn. 211, 56 N. W. 821, this court held that, where buildings are erected by one having no interest in the land on which they stand, an agreement will be implied that the buildings shall remain the personal property of him who erects them,—especially in the absence of any other facts or circumstances tending to show a dif-

ferent intention,—and that, where the land is subject to a mortgage, if the agreement of the mortgagor in possession and the party erecting the building was that it should remain the personal property of the latter, the absence of a concurrent agreement on the part of the mortgagee to the same effect will not, of itself, make the building a part of the mortgage security. It seems to us that the rule here laid down controls the case at bar. There can be no material distinctions between a building apparently affixed to the land, and that of a refrigerating plant so affixed.

The description of the component parts of the machinery, and the manner in which it is affixed to the building, is too lengthy to be inserted in this opinion. The change by installing the 60-ton plant was made, in addition to the 15-ton plant, which had supplanted the natural ice system, and proved to be much more satisfactory and valuable, and to such an extent that it was deemed advisable to further increase the refrigerating facilities and capacity of the building by the addition of the 60-ton plant. Upon the evidence the trial court found that

“The artificial system of refrigeration is more satisfactory than the natural system, in the business of cold storage, and the use of apparatus like that in controversy, or somewhat similar, is becoming general, to the exclusion of the system formerly used in said building.”

While, if the 60-ton apparatus is removed, the part of said building operated by means of it cannot be used as a cold-storage warehouse without putting in other apparatus, or restoring the old system of refrigeration, yet, if the 60-ton plant is properly taken out, any other of the mechanical systems for refrigerating could be installed in the building, with such changes as might be necessary to adapt it to the other systems, at an expense of \$1,700 or \$1,800. The 60-ton and 15-ton apparatus are of the same character, and operate the same way, and the removal of the former would not materially injure the building for the 15-ton plant. But we are satisfied from an examination of the record that the natural system of refrigeration, as operated in this building, was not satisfactory, even if not a failure; and it is reasonable to infer that in no event would it again be resorted to as a successful system, or one benefi-

cial in its financial results. However this may be, the Hercules Ice-Machine Company had no hand in making the original change from the natural ice system to the 15-ton system, and it laid out nothing in the acquisition of the 60-ton system, nor even in the 15-ton system, which alone is much more valuable than the natural ice system, which alone existed when plaintiff made its loan and took the mortgage security on the building. The plaintiff is not the owner of the building, or the property upon which it is situate. It is simply a mortgagee out of possession, and was never misled, and advanced no consideration on the strength of the machinery becoming a part of the realty, which the trial court found did not become so.

Our conclusion is that the order should be affirmed. So ordered.

MITCHELL, J.

I concur in the result. It must be admitted, as established facts in this case, that the 60-ton plant for the artificial system of refrigeration was put in as a substitute for the natural system previously in use in conjunction with the 15-ton artificial plant; that in making this change the drip pans and cold-air ducts or flues used in connection with the natural system of refrigeration had been removed, and certain other minor changes made in the building, which, however, largely increased its storage capacity; also, that, as this building was constructed and is especially adapted for cold-storage purposes, it will be necessary, for its beneficial use, to put in another system of refrigeration in case the 60-ton plant is removed. But the findings of the court, justified by the evidence, are:

"All apparatus pertaining to said 60-ton plant can be removed without material injury to the building or the apparatus." Also: "If said 60-ton apparatus is removed, the part of said building operated by means of it cannot be used as a cold-storage warehouse without putting in other apparatus, or restoring the old system of natural refrigeration." If the 60-ton apparatus were properly taken out, any other of the mechanical systems for refrigerating could be installed in the building, with such changes as might be necessary to adapt it to the other system; it appearing that no other system is precisely like this. "Said building can be restored to the same condition in which it was before said changes were made to accommodate said 60-ton apparatus, at a cost of \$1,700 or \$1,800. The

artificial system of refrigeration is more satisfactory than the natural system, in the business of cold storage; and the use of apparatus like that in controversy, or somewhat similar, is becoming general, to the exclusion of the system formerly used in said building."

It will be observed that, while the court finds that it would cost \$1,700 or \$1,800 to restore the building to the same condition in which it was before the changes were made to accommodate the 60-ton apparatus (that is, to refit the building for the old natural system of refrigeration), there is no finding that the building with the 60-ton apparatus removed will be worth one dollar less than it would have been if the changes had never been made, and the old natural system of refrigeration had been continued. In fact, it is fairly implied by the findings that an artificial system is so much more satisfactory than the natural system of refrigeration, and is coming into such general use, to the exclusion of the natural system, that the building, with the 60-ton plant removed, will be worth as much for cold-storage purposes as it would have been had it remained unchanged, with the natural system intact. Upon this state of facts, the court was right in holding that as between the plaintiff and the defendant George, or those under whom he claims, the 60-ton plant did not become a part of the realty, and is not subject to the lien of plaintiff's mortgage.

CANTY, J.

I concur with Justice MITCHELL, as far as his opinion goes, but would add something more. The new refrigerator plant is so wholly and radically different from the old, and there is such a total want of identity or similarity between the two plants or any of the different parts of each, that the new plant cannot be considered as a mere substitute for the old, so that the plaintiff's mortgage would attach to the new plant as such substitute.

WINTHROP NATIONAL BANK OF BOSTON v. MINNEAPOLIS
TERMINAL ELEVATOR COMPANY and Others.

July 26, 1899.

Nos. 11,708—(207).

Corporation—Liability of Stockholders—Bonds Guarantied by Individual Stockholders.

To secure the payment of its bonded indebtedness, defendant corporation executed and delivered a trust deed upon its property. Two of its principal stockholders guarantied in writing the payment of the bonds, and also included in the deed, and as further security, certain individual property. In an action under G. S. 1894, c. 76, to enforce the stockholders' liability under the constitutional provision, other stockholders contended that because of these acts of the two principal stockholders, and an oral agreement which the latter had entered into with them, when consent was secured to the issuance of the bonds and the execution of the deed, that these two should protect and bear harmless all other stockholders from this liability, a fund was created for the express benefit of both bondholders and stockholders, which must be exhausted before the constitutional liability can be enforced. *Held*, that on the issues made by the pleadings the trial court did not err when it refused to find whether such an agreement was made, and *held*, further, that the evidence produced upon the trial was insufficient to support a finding that a valid agreement of that import was entered into.

Same—Corporate Asset.

The two principal stockholders became personal sureties for the payment of the bonds, and also pledged individual property for their payment, as before stated. This liability did not become an asset of the corporation, to be exhausted before recourse could be had upon the other stockholders under the provisions of chapter 76.

Judgment—Order to Show Cause.

One of the bondholders moved the court, after judgment had been entered herein, for an order citing in the trustee named in the deed to show cause why it should not be foreclosed as to the individual property. *Held*, for reasons stated in the opinion, that the motion was properly denied.

Action in the district court for Hennepin county to enforce the constitutional liability of stockholders in defendant corporation.

The case was tried before Johnson, J., who found in favor of plaintiff and intervening creditors. From a judgment entered pursuant to the findings, and also from an order, Simpson, J., denying a motion for a new trial, and also from an order denying a motion to amend the findings and conclusions, and also from an order denying a motion requiring the trustee to foreclose the mortgage or trust deed referred to in the opinion, certain defendants and Charlotte M. Truesdale, intervenor, appealed. Affirmed.

Albert E. Clarke, F. W. M. Cutcheon, and W. F. Booth, for appellants.

Keith, Evans, Thompson & Fairchild, Flannery & Cook, Jackson & Lancaster, Woods, Kingman & Wallace, and Hahn, Belden & Hawley, for respondents.

COLLINS, J.

This was an action brought under G. S. 1894, c. 76, to enforce the constitutional liability of stockholders in the Minneapolis Terminal Elevator Company. It was claimed by appellants, who are stockholders, that, before resort could be had upon them, a certain fund, which they claim must be regarded as an equitable asset of the company, must be first exhausted. For a better understanding of the case, certain facts, part of which are undisputed, should be stated.

R. B. Langdon, W. H. Hinkle, and T. M. Linton were, in 1891, the principal stockholders in the Minneapolis Elevator Company. It had proven unprofitable, and in October of that year these three men became owners of its property, consisting mainly of an elevator plant. They had previously caused the incorporation, under the statute, of defendant Minneapolis Terminal Elevator Company. In October these men sold the property in question to the new corporation. Its stock shares had been issued, of the par value of \$218,000, Langdon owning more than half. The first year's business seems to have been satisfactory, but during the summer of 1893 heavy losses occurred, and on September 9 a stockholders' meeting was held, at which it was announced that the total indebtedness of the corporation amounted to \$560,000. The stockholders were asked by the managing officers to authorize the issuance of the bonds of

the corporation to cover the debt. Some of the stockholders objected to this because they believed the losses, said to amount to \$300,000, had been incurred in illegitimate and ultra vires transactions in wheat, and because they did not believe the balance of \$260,000 to be a corporation debt. The bonds were subsequently issued.

It is claimed by appellants that, as a condition to granting authority therefor, and to secure payment of the same by a trust deed or mortgage upon the property of the corporation, Langdon and Hinkle agreed with the objecting stockholders that they would personally guaranty the payment of each bond, that they would mortgage certain property of their own to secure payment, that they would purchase 63 shares of stock held by three persons named, and that they would hold the other stockholders harmless from future liability on their stock shares. It is undisputed that Langdon and Hinkle personally guarantied, in writing, the payment of each bond, that their own property was mortgaged to secure such payment in connection with that belonging to the corporation, and that they purchased the 63 shares of stock referred to; that default was made in payment of the principal and interest due on a part of the bonds; and that this plaintiff, as owner thereof, brought an action against the corporation to recover on the same, obtained judgment, and that an execution was issued upon said judgment, and was duly returned unsatisfied.

The complaint included all of the allegations necessary to support this form of action. Several creditors of the corporation intervened with the usual pleading. One of these intervenors, with a claim of more than \$18,000, was an entire stranger to the bonds and mortgage, and had no interest in the foreclosure of the latter, or any of the proceeds which might be realized therefrom. The appellants answered as stockholders, admitting, denying, or alleging want of knowledge as to some of the allegations of the complaint. They also set up the guaranty of Langdon and Hinkle on the back of the bonds, and averred that the security thus afforded was and is ample to discharge the indebtedness. They also alleged the mortgaging of the property belonging to Langdon and Hinkle to secure the bonds, that no part of such property has been sold, and, fur-

ther, that it is of sufficient value to pay the bonds in full, without recourse upon the stockholders. It is also alleged in these answers that the bonds were delivered to plaintiff in payment of an indebtedness of Langdon and Hinkle for which the defendant corporation was not primarily liable, and also that the liability of the latter on the bonds was simply secondary to that of Langdon and Hinkle. To one of the complaints filed by intervenors, appellants answered, among other things, that the bonds and trust deed were issued and executed without any authority whatsoever, and that they were wholly void. No cross bill was filed whereby issues could be raised between the stockholders, on the one side, and Hinkle, the representatives of Langdon's estate (he having deceased before this action was instituted), and the trustee mentioned in the trust deed, on the other, or as between the latter. The answers admitted that on the face of the bonds the defendant corporation was primarily liable, and that Langdon and Hinkle were guarantors, and there was no allegation that plaintiff or the other bondholders ever knew that these were not the true relations between the parties.

Now, as between these bondholders, including plaintiff and appellant stockholders, the issues presented by the pleadings seem to have been simple, and to have been reduced to the claim that the bonds were issued and the trust deed executed without authority. The guaranty and the pledging of the individual property of Langdon and Hinkle for the payment of the bonds stood unquestioned. Both of these acts were apparent from a bare inspection of the bonds and the trust deed, so that the only question arising therefrom is as to the legal effect of such acts in an action brought to enforce a stockholder's liability. On the issue we have mentioned respecting the authority to issue the bonds and to execute the trust deed or mortgage the evidence was conclusive in favor of the regularity of the transaction. Nor was there a particle of evidence, even if it had been admissible, tending to show that the indebtedness represented by the bonds was that of Langdon and Hinkle, or that they were primarily liable thereon. All of the material findings on which rest the order for judgment against appellants, and the judgment itself, are abundantly supported by the admissions

in the answers, or by the evidence adduced upon the trial, much of which was introduced by appellants themselves.

As we understand counsel for appellants, their contention is that, by reason of the guaranty of payment of the bonds entered into by Langdon and Hinkle and the mortgaging of their individual property as security, and an oral agreement which, as before stated, they claim was entered into by these gentlemen and the stockholders that the latter should be protected and held harmless from the liability now attempted to be enforced, a fund was created for the express benefit of both bondholders and stockholders out of which the bonds must be paid if such fund is adequate, and by means of which the latter are to be indemnified, in whole or in part, against loss arising out of an enforcement of the constitutional liability. The argument is that, if the agreement was in fact made by Langdon and Hinkle that they would create a fund for the purpose of paying the debts of the corporation, and thus protect the stockholders, the effect of the agreement was to make the fund an asset of the corporation, which must be looked upon as any other asset and disposed of as such. It must first be exhausted before recourse can be had upon the shareholders.

But from what has been stated as to the contents of the answers filed in this action it is apparent that no such agreement was pleaded. There was not a suggestion anywhere in the pleadings that Langdon and Hinkle had, in order to secure authority to issue the bonds, agreed to do anything more than to guaranty payment of the same, and to pledge certain property of their own as further security. The oral agreement alleged to have been made, and upon which counsel so strongly rely, was not set up in any form. Nor was the claim that such an agreement had been entered into litigated by consent, for all evidence tending to prove it was duly objected to by plaintiff's counsel; and upon the overruling of the objections counsel preserved the same by excepting to the rulings. Under these circumstances it was not error for the trial court to decline to find whether or not Langdon and Hinkle made the oral agreement to protect and save the stockholders from future liability.

But we can easily go further than this, for the evidence produced

as to what transpired in reference to obtaining the consent of the stockholders to the issuance of the bonds and the execution of the trust deed covering the property of defendant corporation was insufficient to justify or support a finding that there was anything which approached a valid agreement. There was more or less talk between Langdon and Hinkle on the one side and another shareholder on the other as to what some of the shareholders insisted upon as a condition to their consent to the taking of the proposed step, but what the result of the conversation was is indefinite and uncertain, even if the oral agreement, as contended for, is enforceable under the statute of frauds. But the fact is that at the meeting at which it is claimed an agreement was made of this character, the appellants being present in person or being represented by agents and attorneys, a resolution was adopted, spread upon the minutes kept by the secretary, and thereafter its contents were incorporated into the trust deed, which carefully and precisely defined the relations between Langdon and Hinkle and the other stockholders, and which indicated almost conclusively that the former did not assume any liability except that of personal guarantors of the debt and pledgors of certain property of their own for its payment. That the defendant corporation was primarily liable for all of the secured indebtedness was recited, and it was provided that Langdon and Hinkle, as guarantors, should be subrogated to all of the rights of the bondholders as against the property and effects of the corporation should they pay the bonds, or should their pledged property be subjected to such payment. This leaves the rights of the parties to be determined by the conceded facts.

The plaintiff made a complete cause of action against the stockholders under the provisions of chapter 76, unless the creditors of the corporation are first obliged to resort to the personal guaranty of Langdon and Hinkle, and to the property pledged by these gentlemen, and to exhaust both of these remedies, before enforcing the constitutional liability of the shareholders in the manner prescribed by statute. It is impossible to conceive how the right of the bondholders to pursue the living guarantor, or the representatives of the estate of the one who is dead, upon their contract of guaranty, or the other right as against the property mort-

gaged by these guarantors, can be regarded as assets, legal or equitable, of the defendant corporation, which must be resorted to or exhausted before judgment as demanded and ordered can be entered in this action. Langdon and Hinkle became personal sureties in behalf of the corporation, and also sureties, as mortgagors of their property; and the liability which they incurred as such sureties is not an asset of their principal. It is, of course, an indemnity contract in favor of the stockholders which they may enforce in their own behalf if they take proper steps so to do. But the stockholders cannot insist as a right that the creditors of the corporation shall enforce the contract, even if all of the necessary parties to such enforcement had been brought into the proceedings. See *Mercantile Nat. Bank v. Macfarlane*, 71 Minn. 497, 74 N. W. 287.

Mrs. Truesdale appeals from an order denying her motion, made about two months after judgment was entered, for an order of the court citing in and making the trustee named in the trust deed a party, and to show cause why the deed should not be foreclosed. All of the property belonging to defendant corporation and covered by the deed had long before been disposed of, as hereinbefore stated, so that nothing remained but the individual property of Langdon and Hinkle. Mrs. Truesdale was found not to be a stockholder. She was simply a creditor in the sum of \$1,000, holding one of the bonds. There are several reasons why the motion was properly denied. It was not made until long after judgment herein had been rendered fully determining the questions presented by the pleadings. It was an improper controversy to drag into the proceedings, for it was merely an attempt to settle, as between the bondholders, a dispute as to the advisability of exhausting the claims against the sureties before enforcing the stockholders' liability. Such a dispute is not a proper subject for settlement in a proceeding of this kind. And, while all of the bondholders were interested in the trust deed and the individual security therein described, some of them had not appeared in this proceeding. Further than this, one of the creditors who had intervened herein (Van Duzee) had no interest whatever in the controversy as to when the trust deed

should be foreclosed. The ruling of the trial court was correct upon this point.

The orders and judgment appealed from are affirmed.

JAMES M. FONDA v. ST. PAUL CITY RAILWAY COMPANY.

August 1, 1899.

Nos. 11,646—(141).

Negligence—Verdict Sustained by Evidence.

Evidence considered, and *held* sufficient to justify the jury in finding that defendant's servants were negligent.

Damages.

Damages *held* not to be excessive.

Practice—Evidence.

Certain questions of practice and admissions of evidence considered and disposed of.

Action in the district court for Ramsey county to recover \$50,000 for personal injuries. The case was tried before Bunn, J., and a jury, which rendered a verdict in favor of plaintiff for \$20,000; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

Munn & Thygeson, for appellant.

Stevens, O'Brien, Cole & Albrecht, for respondent.

BUCK, J.

This action was brought to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant in operating its cars upon Seventh street, in the city of St. Paul, and when plaintiff was about to take passage on one of defendant's said cars. The injuries were serious, resulting in the loss of a portion of both legs. This case was before this court upon a former appeal, 71 Minn. 438, 74 N. W. 166, where the facts were quite fully examined, and the law applicable to the case stated, except such new questions as have arisen on the second trial and will be referred to further on in this opinion. In the former opin-

ion it was held that the evidence made a case for the jury. Upon a retrial the jury rendered a verdict in favor of the plaintiff for the sum of \$20,000. The defendant appealed.

One of the principal questions raised by appellant upon the evidence is that the testimony of the plaintiff is so radically different, as given upon the retrial, from that given upon the former trial, that it now appears that plaintiff was guilty of such contributory negligence as necessarily to change the true conclusion upon the question, hence that plaintiff should stand charged with such negligence as to bar his recovery in this action. We do not agree with the defendant's contention in this respect. We are of the opinion that there is no substantial or material difference in the plaintiff's evidence. And this opinion is substantiated by the evidence which we herewith produce, and is as follows:

Former Trial.

Just as I left the sidewalk to cross Seventh, I looked up and looked both ways. I see a car approaching from the east over a block away, and I also looked the other way towards the west, and there was a car coming from that way too; and I walked out on the rails, and my intention was, as I walked out there, to get across the rails before the east-bound car got down there (the car I was going to take). As I walked out on the track, that east-bound car got down there, and I couldn't cross it. So I hesitated a minute as the car got down by me. Then I started to walk around the tail end. Just as I started to walk around the tail end, and took a few steps, this west-bound car came along, and struck me, and knocked me down. * * * I signalled as I walked on to the track. I signalled the east-bound car for the car to stop, —waved my hands like that [indicating] to the motorman.

Present Trial.

As I stepped off the sidewalk I looked up. I looked both ways. I see a car approaching from the east, about a block or more away. I also see a car coming from the west. That car was coming down nearly to the west crosswalk of Seventh street, —coming down the grade. I walked out there with the intention of getting on,—crossing those tracks to get on the south side to take my east-bound car. As I walked out there, I see I couldn't cross in front of the east-bound car, so I started to walk around the tail end of it. Just as I started to turn and took a few steps, this west-bound car came along and struck me, and knocked me down.

* * *

Cross-Examination.

Q. When you saw the car coming from the west, was that as you left the curbstone also?

A. Yes, about the same time.

Q. How far away was that car?

A. Well, it was nearly down to the corner.

Q. It was nearly down to the corner?

A. To this side of the middle of the block nearly to the corner.

Q. Nearly to Seventh street?

A. Nearly to Walnut street.

Q. Well, how near Walnut street was it? Was it up to the west crosswalk?

A. I don't think it was quite.

Q. Was it nearly up to the west crosswalk?

A. It was down that way this side of the middle of the block along down the grade there.

Q. And how far west of Walnut street was it?

A. Well, I couldn't tell. I should imagine it was this side of the middle of the block.

Q. You mean it was about the middle of the block?

A. A little this side of the middle of the block.

Q. How near this side,—as near as you can fix it?

A. Well, I couldn't tell just how far. I know it was this side of the middle of the block. It was nearly down to the crosswalk.

Q. It was nearly down to the west crosswalk of Seventh street?

A. Yes, sir.

Q. You are sure about that?

A. Quite certain about it; yes, sir.

Cross-Examination.

Q. At the same time, or just as soon as you looked towards the east, you looked towards the west then, did you?

A. About the same time; yes, sir.

Q. And you saw the east-bound car as you have described it?

A. Coming down.

Q. You saw the east-bound car, I say, coming?

A. Yes, sir.

Q. Well, did you watch the east-bound car from that time on, or did you simply walk across the street?

A. I simply walked out there.

Q. Didn't you pay any further attention to the east-bound car?

A. No, sir; I walked out there, and I signalled for it to stop.

Upon the legal questions raised, so far as they appear and are discussed in the memorandum of the trial court, we adopt it as part of this opinion, as follows:

"The first point urged as error by defendant is the overruling of its objection to the question asked the witness Pierce at page 194

of the record. The fault in the question is alleged to be that the witness was asked to base his opinion of the distance within which the car could be stopped partly upon 'the other circumstances as you observed them there on that day.' It seems to me that, in view of the evidence that had already been given in the case, including the evidence given by this witness, and especially in view of the fact that there was no dispute as to what the circumstances were, this was not, in effect, 'leaving the witness to determine upon what he would base his testimony.' There was absolutely no conflict as to what the 'other circumstances were there on that day.' The only circumstance over which there was a dispute was the condition of the track,—whether it was good or bad; and the witness had testified that it was a good track. This disposes of the objections to the use of the words, 'in the condition the track then was,' as it is clear that a good track was meant. While it is unquestionably the rule that the opinion of an expert witness must be based upon the testimony in the case, or, in the absence of that, upon facts which are disclosed to the court and jury, in order that the jury may know the facts upon which the witness bases his opinion, and thereby be able to give it the proper weight, depending on their decision of whether the facts are true or false, yet this rule is not merely technical, and, where the reason for its strict application does not exist, it cannot be error to fail to apply it strictly. In this case, granting that the question is technically faulty, because it referred to the facts observed by the witness, instead of the facts disclosed by the testimony, it seems to me to be a certainty, in view of the lack of conflict as to what the facts were, that the facts observed by the witness were the identical facts shown by all the testimony to exist. This applies to the words, 'using all available means at hand.' What these means were was conceded and fully explained by the witness himself. Plaintiff's counsel make the point that the objection to this question was not sufficiently specific. In view of my holding that the question was proper, it is unnecessary to decide this point. But, while I should probably hold the objection sufficient, I cannot refrain from saying that, in my opinion, it would be a better rule to compel counsel to point out the objectionable words in a hypothetical question, or to indicate clearly their contention as to matters omitted. The object of counsel should not be to allow error to creep into the record, but rather to keep it out, by pointing out the error claimed clearly and specifically.

"The next point urged by defendant as error is the giving of plaintiff's second request: 'Street cars are, in the main, governed by the same rules as other vehicles on the street, and they are owners of only an equal right with the traveling public to use the street.' In *Wilson v. Minneapolis St. Ry. Co.*, 74 Minn. 436, 77 N. W. 238, a case of a collision at a crossing between a vehicle and a street car, the supreme court held the giving of this instruction, unmodified, to be reversible error. It is to be noticed that in the

case at bar the collision was between a foot passenger and a car, but it is probable that the instruction given would be held error, except for the modification given in other portions of the charge, and particularly in defendant's eighth request, at page 244 of the record, which commenced as follows: 'Although street cars and foot passengers have equal rights at crossings, the fact that a pedestrian can either stop or turn his course instantly, and, by looking and listening, can, under ordinary circumstances, avoid being injured by an approaching car, while the car cannot change its course,' etc. This request not only supplied the proper modification of the rule given in the objectionable request, but supplied it in defendant's own language, and, indeed, the instruction shows that it is intended as a modification of the rule, as it expressly refers to the rule itself in the language, 'Although street cars and foot passengers have equal rights at crossings.' In the Wilson case there was no modification in any part of the court's charge, and the fact that the instruction was given without modification constituted the error. It is true, as a general proposition, that an erroneous instruction is not cured by a correct one given in another part of the charge; but the rule does not apply where the first instruction is correct as far as it goes, and the second instruction purports to be and is a completion and modification of the first. I am unable to perceive how the jury could have been misled, or the defendant prejudiced, by the giving of plaintiff's second request, in view of the giving of defendant's eighth request.

* * * * *

"Plaintiff's fourth request did not submit the question of wilful negligence to the jury. It was given, and I think properly given, on the issue of defendant's negligence in connection with defendant's fourth request; and the jury was specifically told that there was no evidence in the case that the motorman actually saw Fonda in time to have avoided the accident, that the question of wilful or wanton negligence was not in the case, and that plaintiff's contributory negligence would bar his recovery.

"Plaintiff's eighth request is in the language of the opinion of the supreme court on the former appeal. There was no error in giving it.

"The case of *Morrow v. St. Paul City Ry. Co.*, 74 Minn. 480, 77 N. W. 303, disposes of the question as to a special verdict.

"Defendant contends that the damages are so excessive as to show that the jury was influenced by passion and prejudice. I do not think so. While the verdict is a large one, it must not be forgotten that the plaintiff's injuries were very serious; that he lost the use of both legs, and is a cripple for life; that he never will be able to work or enjoy life as others do; that he was nearly a year in the hospital, and suffered much pain; that his mental suffering, by reason of his condition, must have been, and must always be,

great. In view of these and other facts, I am unable to say that the verdict is so excessive as to warrant the assumption that the jury was influenced by passion or prejudice."

The defendant, by its fifth assignment of error, raises the question that the court erred in permitting plaintiff to show by the defendant's witness Wallin, the motorman on the train running west, that since the accident he had been taking care of the cars at the Rice street station. The court refused to let the plaintiff show that Wallin had not run any cars since the accident, but permitted plaintiff to ask the witness what he had been doing up at Rice street station, and he answered, "Taking care of the cars." But prior to this the plaintiff had shown by this witness, and without any objection on the part of the defendant, that ever since the accident Wallin had been working for the company on the Rice street station. This clearly proved that he was not running the cars during such time as motorman, and hence, whether he was taking care of the cars, or doing some other business there other than that of motorman, would be quite immaterial, or, if technically error, it would be a harmless one, as the main fact that he was no longer acting as motorman had already been fully proven without objection. It could not have misled the jury, and in no way injuriously affected the rights of the defendant.

As to the eighth, ninth, and tenth assignments of error, it sufficiently appears that all of the expert witnesses were familiar, from the evidence, with the locality, track, grade, cars, machinery, load, weather, and all other conditions to justify the court in permitting the questions to be put to the witnesses, and allowing them to answer. Of course, it was a matter for the trial judge to pass upon the qualifications of the expert witnesses, and his decision thereon was conclusive, unless clearly erroneous, as a matter of law, which is not claimed in this case. There was no contention but that the track was a good one and in good condition.

The only remaining question necessary for our determination is raised by the sixth assignment of error. Robertson, a witness called by the defendant, testified that he was driving a top wagon on the north side of Seventh street, going out West Seventh street, and about the corner of Walnut street (about 40 feet from the place

of the accident), when the accident occurred, and that the west-bound car was going at the rate of only seven or eight miles an hour, and that its bell was ringing. In rebuttal, the plaintiff called as a witness one Murdock, who, after testifying that he was on the south side of Seventh street, going towards Walnut street, and only about 150 feet distant from the place of the accident when it occurred, and after his attention was called to the testimony of Robertson, was asked: "Now, did you see any team at that place (where Robertson located his team) as you walked along there?" To which he answered, "I didn't see any team." He was then asked, "Do you think you would have seen a team if there was one there?" To this question the defendant objected, and, the objection being overruled, excepted. The answer of the witness was: "I think I would; yes." The admission of this evidence is assigned as error, upon the authority of *Hathaway v. Brown*, 22 Minn. 214. The witness on his cross-examination admitted that he was not paying any particular attention to what was going on on Seventh street; that he could not tell whether he was looking straight ahead or across the street; that he paid no particular attention—only in a general way—as to whether there was any team on Seventh street; that he saw a great many people on Seventh street at the time, although he did not recollect any particular one; that he could not say whether he saw any other teams on Seventh street or not.

It is often difficult to determine whether a question of the character of the one objected to calls for a fact or a mere opinion. This often depends upon the particular facts of the case. *Hathaway v. Brown*, whether decided rightly or not, seems to have become generally ignored by the bar of the state; for scores of cases have come to this court, especially personal injury cases, in which similar questions were asked, and answered without objection. Indeed, this is the first time within our recollection when *Hathaway v. Brown* has been invoked as an authority. There may be a distinction between testimony as to whether a witness would have heard a sound, and whether he would have seen an object. See suggestions of Justice Cooley in *Marcott v. Marquette*, 49 Mich. 99, 13 N. W. 374. But, without now considering or questioning the correct-

ness of *Hathaway v. Brown*, we are of the opinion that, under the circumstances, there was no error in admitting this question, which calls for a reversal. It was a self-evident proposition that the witness would have seen the team and buggy, if they had been there, provided his attention had been at the time called to the matter, and his vision turned in that direction, for the purpose of ascertaining what the fact was. But the force of his answer was entirely destroyed by his admissions on cross-examination. In view of these admissions, his statement that he thought he would have seen the buggy, if it had been there, could not possibly have had any weight with, or effect upon, any intelligent jury.

Order affirmed.

MERCHANTS' REALTY COMPANY v. CITY OF ST. PAUL.

August 1, 1899.

77	348
82	277

Nos. 11,689—(217).

City of St. Paul—Sale for Unpaid Local Assessment—Expiration of Time to Redeem—New Notice.

The charter of St. Paul provides that land sold for special assessments of taxes for local improvements may be redeemed within five years, but the time to redeem does not expire until a certain notice is published by the city officials; and, if a deed or certificate of tax sale is set aside in any action on account of any irregularities, the holder of the deed or certificate shall recover from the city the amount paid by him at the tax sale, or paid to the city on taking an assignment from it of a certificate issued to it if the land was bid in by it at the tax sale. Plaintiff took such an assignment. Near the end of the five years, the city gave a notice of expiration of redemption, and after the five years issued a deed to plaintiff, which was void because the notice was not properly given, and was held void in an action between plaintiff and the owner of the land; but the certificate issued to him was not held void. Thereupon this action was brought to recover from the city. *Held*, the city could give a new notice of expiration of redemption after the five years, and issue a new deed after the time to redeem expired (following *Flanagan v. City of St. Paul*, 65 Minn. 347); that the city is entitled to a reasonable time in which to give the new notice and issue the new deed; that it cannot be said, as a question of law, that under all the circumstances more than

such a reasonable time elapsed before the commencement of this action; and that the court below did not err in holding that plaintiff is not entitled to recover.

Same—Description.

The land is situated in Bazille & Roberts' addition to West St. Paul, in said city, but is described in the tax proceedings as being in Bazille & Roberts' addition in St. Paul. There is no other Bazille & Roberts' addition in the city. *Held*, the description is sufficient.

Action in the district court for Ramsey county to recover \$1,602.88 as reimbursement on account of an invalid tax deed. The case was tried before Jaggard, J., who found in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. *Affirmed*.

Daniel W. Doty, for appellant.

James E. Markham and Carl Taylor, for respondent.

CANTY, J.

The facts in this case are undisputed. The plaintiff's assignor, on January 31, 1889, paid into the treasury of the defendant city \$1,602.88, in consideration of the assignment to him of a certain tax certificate of sale of the lot therein described. The certificate was assigned to the plaintiff, which, on March 11, 1895, surrendered it to the city comptroller, and a tax deed was issued to it for the lot. Upon receiving the deed, the plaintiff, in April, 1895, went into possession of the lot, and thereafter, in September, 1898, brought suit against the holder of the record title to determine his adverse claim. The defendant in that action, in his answer, denied the plaintiff's title, alleged title in himself, and demanded affirmative relief to the effect that he recover possession of the lot; and no claim is here made that the action was not brought and prosecuted in good faith. On the trial of the precedent action, the plaintiff, to establish its title, offered the tax deed in evidence, to which the defendant objected on the ground that notice of the expiration of redemption had not been given before the deed was issued, and on the ground of seven other irregularities claimed to appear on the face of the deed, which rendered it void. The court refused to receive the deed in evidence, but did not state on which of the grounds urged the objection to the admission of the deed in evidence was sustained.

The judgment in the precedent action was entered in December, 1898, and adjudged that the plaintiff was not the owner of the lot, but that the defendant was, and was entitled to the possession thereof; but neither the findings nor judgment made any reference to the tax deed or proceedings. The plaintiff had and claimed on the trial of the precedent action no other title except by virtue of the tax deed.

1. Section 142, Municipal Code of St. Paul (Sp. Laws 1889, c. 32, § 50, p. 590), provides as follows:

"That in any action heretofore or hereafter commenced in which the validity of a deed or certificate of sale issued under this act is brought into question, and on account of any irregularities, the same shall be set aside, the party holding such deed or certificate of sale shall recover from the city of St. Paul the amount paid by the purchaser at the sale, or by the assignee of the city on taking an assignment certificate, with interest at the rate of seven (7) per cent. per annum from the date of such payment. Such amount shall be paid out of the city treasury upon the order of the common council of said city."

It will be observed that the holder of the tax certificate or deed can recover from the city only when such certificate or deed is set aside "on account of any irregularities." The language here employed is essentially different from that used in G. S. 1894, § 1610. The city does not agree to defend the lien or title which it assigns or conveys under its charter, and it may be a question whether the city is bound by the result of the precedent action mentioned in section 142, unless there was in fact an actual irregularity on which the court was in such precedent action warranted in setting aside the certificate or deed. But that question has not been argued, and it is not necessary to decide it here.

At most, but two irregularities, or alleged irregularities, were made to appear affirmatively in this action as irregularities on which the court in the precedent action was warranted in setting aside the deed. One of these irregularities is that the deed is void on its face for the want of proper recitals of the prior proceedings on which it is founded. (Such prior proceedings were not introduced in evidence in the precedent action.) It is not necessary to consider the sufficiency of this alleged irregularity, because, in any

event, the deed is in fact void, and was properly set aside because of the other irregularity, which is that no sufficient notice of the time of expiration of redemption was given, and the deed is therefore void, as held in *Bergen v. Anderson*, 62 Minn. 232, 64 N. W. 561.

No other irregularities appearing, the action of the court in setting aside the deed in the former suit will be referred to such irregularities as do appear and are sufficient ground to warrant the court in rightfully setting the deed aside. But those two irregularities affect the deed alone, and do not affect the certificate which plaintiff purchased from the city. We held, in *Flanagan v. City of St. Paul*, 65 Minn. 347, 68 N. W. 47, that if the city treasurer fails to give the proper notice to cut off the time for redemption at the end of the five years, the notice may be given afterwards, and the time to redeem terminated at a date subsequent thereto. It therefore follows that plaintiff's certificate has not yet been merged in a deed, and has not yet become *functus officio*, because no valid deed has yet been issued. Neither was this certificate set aside, either directly or indirectly, in the precedent action.

But plaintiff claims that under the above-quoted language of the statute it is entitled to refundment from the city whenever its certificate or its deed is set aside for any such an irregularity; that it is not necessary, under the wording of the statute, that both the deed and the certificate be so set aside. This position is very plausible, but is not, in our opinion, warranted by a proper analysis and construction of the different provisions of the statute. Said section 142 is section 50, tit. 1, subc. 7, c. 7, Sp. Laws 1887 (as so amended in 1889). Section 45 provides that, if no one else bids at the tax sale the amount due, the lot or parcel

"Shall be struck off to the city; and thereupon the city shall receive, in the corporate name, a certificate of the sale thereof and shall be vested with the same rights as other purchasers at such sales."

The statute provides that this certificate is assignable, and other provisions of the statute contemplate that, if the purchaser from the city makes his purchase before the time to redeem expires, he shall take an assignment of this certificate; but, if he makes his pur-

chase after such time expires, he shall take from the city a deed of the lot or parcel. The above-quoted provisions of section 142 apply both to cases where the purchaser took a certificate in the first instance and to cases where he took a deed in the first instance. In order to cover both classes of cases, the language of the statute was made somewhat broad and general. In the present case the plaintiff purchased before the time to redeem expired, and received from the city an assignment of the certificate, which we must hold to be valid. No proper notice was given by the city officials terminating the time to redeem at the end of the five years; therefore the deed subsequently issued is void. But the delivery of the certificate at the time of receiving the void deed did not have the effect of cancelling the certificate.

By the terms of the contract between plaintiff and the city, the city should, of its own motion, have terminated the time to redeem at the end of the five years. But this provision of the contract is a condition subsequent, and for the purposes of forfeiture or rescission such conditions are construed more strictly than are conditions precedent. In executing the deed, the city officials did not act merely as the agents of the city. They acted as agents or trustees for all parties,—for the city, the plaintiff, and the owner of the equity of redemption,—just as the sheriff on a foreclosure sale under the power acts as agent or trustee for all parties. When the five years expired, and the plaintiff applied for the deed, the city officials should have said to plaintiff: "We owe it as a duty to the owner of the equity of redemption to refuse to execute this deed to you, and thereby cloud his title, or embarrass him with a void deed." If the city officials had thus refused, plaintiff could not have compelled them to execute the deed. A deed which never existed could not have been set aside in the precedent action, and plaintiff could never have maintained that action.

Under these circumstances, plaintiff cannot found a cause of action on the fact that he procured from the city officials a void deed, which he had no right to demand, and they had no authority to issue. Neither can it be held that the above-quoted provisions of the statute apply to such a deed. The deed mentioned in those provisions is the deed which is the subject of the purchase from the

city, or a deed which, under the contract, the purchaser has a right to demand that the city officials shall subsequently issue to him. But he has no right to demand that they subsequently issue to him a void deed, which, under the law, they are not authorized to issue. True, the city cannot avoid its liability for refundment to the purchaser of a certificate by failing for an unreasonable length of time to perform the condition subsequent in the contract, by which the city agreed to cut off the time to redeem. The city cannot, in this manner, deprive the purchaser for an unreasonable length of time of an opportunity to test his rights, and ascertain whether or not he is entitled to such refundment. But the fact that plaintiff received the void deed, retained it, and made no demand for a valid deed and no objection to the void deed until it commenced this action, should be taken into consideration in determining what, under all the circumstances, is a reasonable time in which the city should give a proper notice of the expiration of the time to redeem, and issue a valid deed. Plaintiff's acquiescence in what had been done is a proper element to be considered in determining what is such a reasonable time. Under all the circumstances, we cannot say that more than a reasonable time elapsed before the commencement of this action.

2. The land in controversy is lot 1, block 5, in Bazille & Roberts' addition to West St. Paul, in the city of St. Paul. It is described in the tax proceeding and in the certificate and tax deed as "lot 1, block 5, in Bazille & Roberts' addition to (or in) St. Paul." There is no other addition in the city known as "Bazille & Roberts' Addition." In our opinion, the description is sufficient, even in proceedings in invitum. This disposes of the case.

The order denying a new trial should be affirmed. So ordered.

SAM GAINES v. CHARLES TRENGROVE and Others.

August 1, 1890.

Nos. 11,707—(220).

Contract for Carrying Mail.

Certain contracts—one between the government and a star route mail contractor, and one between the latter and a subcontractor—for the carrying of mails between certain points construed.

Same—Cancellation by Postmaster General.

In the contract first mentioned it was stipulated that the postmaster general might annul the contract or impose forfeitures, in his discretion, for repeated failures, or for a failure to perform service according to the contract. *Held*, that the postmaster general was an umpire selected by the parties, whose decision to annul the contract or to impose forfeitures could only be impeached on the ground of fraud, or such gross mistake of the facts as would imply bad faith, or a failure to exercise honest judgment; clear, strong, and satisfactory evidence being necessary to impeach his decision on the ground of mistake.

Same—Subcontract.

Under the federal statute the subcontract was invalid without the consent of the postmaster general. This consent and approval were obtained in the case at bar, the subcontract being expressly made subject to the postal laws, and all of the requirements found in the original. The subcontractor entered upon his duties, but, after repeated failures on his part, the postmaster general refused to allow him to carry the mails, and terminated his right so to do. *Held*, in an action brought by the contractor to recover damages for a breach of the subcontract, that the action of the postmaster general amounted to a withdrawal and cancellation of his previous approval, terminated all contractual relations between the parties to the subcontract, and virtually annulled the original. *Held*, further, that the decision of the postmaster general was conclusive on the question of a breach of the subcontract, in the absence of any claim that there had been a fraud committed, or that there was such a gross mistake of fact as would imply bad faith or a failure to exercise honest judgment on his part.

Same—Evidence.

Held, further, in view of this construction of the contracts, that, if error was committed on the trial in the introduction of certain exhibits in evidence, it was error without prejudice.

Same—Verdict Sustained by Evidence.

And *held*, further, that under the instructions of the court to the jury the verdict was justified by the evidence.

Action in the district court for St. Louis county to recover on a bond executed by defendant Trengrove as principal and by the other defendants as sureties. The case was tried before Ensign, J., and a jury, which rendered a verdict in favor of plaintiff; and from an order denying a motion for a new trial, defendants appealed. Affirmed.

W. G. Bonham and Francis W. Sullivan, for appellants.

Washburn, Lewis & Bailey, for respondent.

COLLINS, J.

Plaintiff, Gaines, was a star route mail contractor for the carrying of United States mails between Tower and Rainy Lake, in this state, for the four-year period commencing July 1, 1895. Defendant Trengrove was a subcontractor with plaintiff for the same service, and the other defendants were his sureties; a subcontract having been entered into May 29, 1895, between plaintiff and defendants, with the consent of the postmaster general, as required by law. 1 Supp. R. S. c. 107, § 2.

By the terms of this subcontract it appeared that plaintiff had entered into a contract with the government, and had obtained conditional permission to sublet the same from the proper officer,—without which the contract for subletting would have been void,—and in terms it was stipulated that defendant Trengrove should perform his part thereof in full compliance with the postal laws and regulations, and subject to all the requirements imposed upon plaintiff, Gaines, under his contract with the government. And upon the back thereof these regulations, requirements, and stipulations, taken bodily from such contract, were printed in full. As a part of these, and to which the contract was subject, was a stipulation that the postmaster general might annul the contract or impose forfeitures, in his discretion, for repeated failures or for a failure to perform service according to contract, or for many other acts on plaintiff's part, or failures to act. He was thus constituted an umpire as between plaintiff and the government for the purpose of

cancelling or annulling the contract or for imposing forfeitures, in his discretion, should the former become derelict in the performance of his part of the contract.

Defendant Trengrove entered upon the performance of the subcontract July 1, 1895, and continued to carry the mails up to January 16, 1897, at which time the officials of the department refused to deliver mail to him or his servants, upon the ground that he had repeatedly and habitually defaulted in carrying the mails, and without cause had abandoned his contract, and failed to perform the same in accordance with its terms. Plaintiff was notified by the department of this breach of Trengrove's contract, as well as his own, but was allowed again to attempt to fulfil his own contract, which he did by providing a mail carrier temporarily; and, later on, he again sublet, with the approval of the postmaster general.

This action was brought to recover damages because of the alleged breach of the subcontract, judgment being demanded against defendant Trengrove for the full amount, averred to be \$1,514.96, and against each of his sureties for \$1,000, the amount for which such sureties had become bound under the terms of their contract. The verdict was for \$900 as against all of the defendants.

Counsel for the latter discuss their appeal under three heads: First, alleged errors relating to the construction to be placed upon the two contracts; second, those relating to the admission of evidence; and, third, those which bear upon the claim that on the evidence and the instructions of the court as to the measure of damages there must have been a verdict for defendants, or a verdict for plaintiff for the sum of \$200.26 only, or a verdict for him in the full amount claimed.

The trial below seems to have proceeded upon the theory that it was incumbent upon plaintiff not only to show that the department annulled the subcontract by refusing longer to deliver the mails under it to defendant Trengrove, but that the latter had actually failed to perform in accordance with the terms of his own contract, and therefore that the department had good and valid reasons for its action. This whole question of the manner in which the subcontractor attempted to carry out his agreement was gone into at length, precisely as it would have been if this had been an ordinary

contract for the performance of work and labor between individuals, and there had been a breach on the part of the one who had undertaken to perform. But the contract in question is not of that character. The plaintiff had entered into an agreement with the government to carry the mails, and both parties had stipulated that the postmaster general should determine as between them when there was a failure to perform on the part of plaintiff, and should also determine the penalty to be imposed. An annulment of the contract was not to impair the right of the government to claim damages, which were to be assessed and liquidated by the auditor of the post-office department. These were among the express provisions of the original agreement. And the subcontract was made with reference to them, and to all of the postal laws, and the requirements imposed upon plaintiff. The subcontract was also void without the approval of the postmaster general, and he and the auditor were as much the umpires as between the original contractor, Gaines, and the subcontractor, Trengrove, as they were between the former and the government.

As the law required this subcontract to be approved by the postmaster general before it became valid, it must follow that this approval could be withdrawn at any time, and such withdrawal would have the effect of terminating the contractual relations theretofore existing between the parties; and if for any of the reasons stated in the original contract and also in the subcontract the umpire should annul the former, the latter would fall with it; and all damages arising thereunder could be assessed and liquidated by the other umpire agreed on for this purpose, the auditor of the post-office department. The subcontract being subject to the postal laws and the requirements of the original contract, it is obvious that the action of the umpires, the officials of the post-office department, would be controlled by the settled rule which governs when an umpire has been selected by the parties, namely, that his decision can only be impeached on the ground of fraud, or such gross mistake of the facts as would imply bad faith or a failure to exercise honest judgment. And clear, strong, and satisfactory evidence is necessary to impeach an umpire's decision on the ground of mis-

take. This rule has been applied a number of times in this court in cases where the determination of an umpire was involved.

There was no claim in this case that when the postmaster general directed that, because of his repeated failures, mails should not again be delivered to Trengrove, and thus withdrew his approval of the subcontract, and virtually annulled both contracts, he acted fraudulently, or under a gross mistake as to the facts. Giving to defendant's evidence its greatest weight, it simply tended to show that he had some excuse for failing to perform the service agreed on. Under these circumstances the decision of the postmaster general was conclusive upon the defendants, and established the allegations of the complaint in respect to a breach of the subcontract, and its termination by the act of the umpire. This view of the contracts disposes of nearly all of the claims of counsel as to the construction of the same, and also disposes of the alleged errors in the admission of evidence, principally exhibits, for, if there was error, it was without prejudice. This is evident when we realize that under the pleadings it was unnecessary to go further than to show the decision and action of the postmaster general when he withdrew his approval or consent to the further continuance of the subcontract and terminated the same, as he had a right to do.

Referring specially to the alleged error in respect to the admission in evidence of the exhibits attached to the deposition of plaintiff, Gaines, it is only necessary to say that Exhibit B was not introduced in evidence or read to the jury. Whether it should have been suppressed because not sufficiently identified is therefore immaterial.

This brings us to the contention that the verdict was not justified by the evidence, because under it and the instructions in reference to the measure of damages the verdict should have been either for plaintiff in the sum of \$200.26, or for the full amount claimed, or it should have been for defendants. As before stated, the verdict was for \$900 as against all of the defendants. Counsel for defendants made a general request to charge on the measure of damages numbered 9, and at the refusal of the court so to charge took an exception. But this exception has not been argued, and, even if it

had been, there would be nothing in it, for the substance of the request was given elsewhere. The request of plaintiff's counsel to charge as to the measure of damages, numbered 7, was given, and an exception taken to "that portion of No. 7 relating to the assessment of damages." This exception has not been argued, although assigned as error. But, in any event, a portion of the request was a correct statement of the law as to damages, and so the exception was too general to be of value. So defendants have not presented to this court any substantial reasons why the verdict was not warranted by the charge as to the measure of damages. And the amount thereof was clearly justified by competent evidence as to the losses sustained as the necessary result of Trengrove's failure to perform the service agreed upon. This is really conceded by counsel when they insist, as they do in their brief, that the verdict was a compromise, and, if for plaintiff in any sum, should have been for the amount of \$1,000 against the sureties and for something over \$1,500 against Trengrove. That the damages awarded are less than the amount for which a verdict could have been rendered is no reason for granting defendants' motion for a new trial.

Order affirmed.

CANTY, J.

I cannot concur in that portion of the above opinion which holds that the postmaster general may withdraw his consent to the subcontract after that consent has been once given. He may do this indirectly. He may cancel the principal contract, and with it the subcontract will fall. He can reinstate the principal contract on condition that the subcontract be not reinstated. If he can do these things by two separate moves, he may in good faith do all of them by one move, and may declare the principal contract forfeited unless the contractor prevents the subcontractor from performing or attempting to perform the subcontract any longer. Under such duress as this, the contractor is justified in preventing the subcontractor from attempting to further perform, as by the terms of the subcontract the postmaster general is made an umpire to determine what is sufficient cause to cancel the principal con-

tract, and that the subcontract shall abide the event of that decision.

I concur in the result and in the other portions of the opinion.

STATE ex rel. W. B. DOUGLAS v. OLAF GYLSTROM.

August 1, 1899.

Nos. 11,723—(227).

Inspector of Boilers—Eligibility—Quo Warranto—Evidence.

When the governor has made an appointment of inspector of boilers, and the eligibility of the appointee to hold the office under the provisions of G. S. 1894, § 481, is questioned by the attorney general in proper proceedings, the question of eligibility is not to be disposed of by weighing the evidence, and determining on which side it preponderates. If there is evidence which reasonably tends to support the conclusion of the governor when he was called upon to pass upon the qualifications of the appointee, his action cannot be set aside by the court.

Same.

Held, testing the evidence by this rule, that the respondent, Gylstrom, was eligible to the office of inspector of boilers, to which office he was appointed by the governor in March, 1899.

Writ of quo warranto issued by the supreme court requiring respondent to show by what warrant he held and exercised the office of inspector of boilers for the fifth congressional district. Writ quashed.

W. B. Douglas, Attorney General, and *Weed Munro*, for relator.

Harry Lund and *Russell, Cray & Jamison*, for respondent.

COLLINS, J.

The question here is as to the eligibility of the respondent, Gylstrom, to hold the office of inspector of boilers for the fifth congressional district, to which office he was appointed by the governor March 28, 1899. Testimony as to his qualifications, under G. S. 1894, § 481, has been taken by a referee, and returned to this court. The section referred to reads as follows:

"No person shall be eligible to hold the office of inspector of boilers who has not had at least 10 years of actual experience in operating steam engines and steam boilers, * * * or who is not * * * suitably qualified by experience in the construction of steam boilers so as to enable him to perform the duties of the office," etc.

It is averred in the information that Gylstrom has not had 10 years of actual experience in operating steam engines and steam boilers, and that he was not licensed to operate a steam boiler or steam machinery, under section 489, until January 5, 1899. It is not alleged that he is not suitably qualified by experience in the construction of boilers so as to enable him to perform the duties of his office.

The object of the statute prescribing the qualifications of appointees to the office of boiler inspector is apparent. The intention of the lawmakers was to secure a thorough inspection of steam boilers by men whose experience was practical, and had continued for such a period of time as would ordinarily well qualify and equip them with the knowledge required for a proper discharge of their duties. Not only are they required to have experience in operating boilers and engines, but the statute demands that they have had suitable experience in construction. Ten years' actual experience in operating, and such experience in construction work as will suitably qualify the appointee, are the tests. And the state, through its attorney general, having legally questioned respondent's eligibility to the office, the burden of proof is upon him to establish that he is eligible. *State v. Sharp*, 27 Minn. 38, 6 N. W. 408. But the question of his eligibility is not to be determined by this court by merely weighing the testimony, and then determining the matter upon a preponderance of evidence, as counsel for relator seem to assume, for that would be an encroachment upon the functions of the governor, who has made the appointment, and in so doing has passed upon the qualifications of Mr. Gylstrom for the place. If there is evidence which reasonably tends to support the conclusion reached by the executive when he was called upon to determine this very question of eligibility under the statute, this court cannot interfere, and say that, because the proofs preponderate against the respondent, the action of the governor must be set aside.

We have examined the evidence with great care, and, if the weight was to control, should be compelled to hold with the relator. But there is enough, measured by the rule which we must apply, to sustain the conclusion of the appointing power. A brief statement of the testimony upon this point is as follows: Gylstrom was 28 years of age when appointed to the office. When a boy, aged 14 or 15 years, he worked about steam boilers and engines in actual operation, generally assisting in firing. In 1886 he had exclusive charge of a small steam boiler and engine, and operated the same for six weeks. In the fall of that year he entered the employ of the Enterprise Company, at Minneapolis, as an apprentice, and remained in its service for 12 years continuously; that is, up to a short time before he was appointed inspector. His last employment was for another company in this same line of business, in the same city. The business of the Enterprise Company was buying, selling, repairing, and making steam engines, making and repairing steam boilers, and "setting up" "steam plants." His work for the company was quite general, and in all its branches. He had the experience which might be expected where a young man enters upon such employment, and continuously works for one concern for the period of 12 years. During those years his work involved the application of steam under all sorts of conditions, for nearly all of the business transacted had to do with the examination of the steam boilers and engines brought for repairs, the actual testing for the purpose of ascertaining what the defects were, and where located, and the construction or repairing, putting in place, starting up, and actual supervision of steam plants. During the years of service with the company, Gylstrom had practical experience with, approximately, 100 different plants which were either in the hands of his employer for repairs and again putting in use, or were constructed by it, and set in operation. The greater part of his time for at least 10 years before he left the employ of the Enterprise Company was taken up in handling and testing steam machinery, and after he left that company his work was along the same line. According to his own evidence, he had actually been engaged 11 years in the actual operation of steam boilers and engines. Other witnesses corroborated him on this point, and fur-

ther testified as to his qualifications for the office. That for 10 years prior to his appointment he had been recognized by his employers as a competent man to discover and repair all sorts of defects in old plants, and to handle and operate them, as well as new plants, was abundantly established by the evidence.

Unless we are to construe the statute as meaning that a person, to be qualified for the position of inspector, must have operated steam boilers and steam engines for at least 10 years to the exclusion of all other work it would seem that Gylstrom was not disqualified. That the statute cannot be construed so technically is evident from the fact that the appointee must also have had experience in the construction of boilers; and when we appreciate what kind of services are required of an inspector, we can easily see why some knowledge of construction is required. In addition, it is not amiss to say that a man with the varied experience of the respondent in examining, discerning defects, repairing, testing, putting in running order, and operating old boilers and engines for 10 or 12 years might easily become better qualified for the position of boiler inspector than a man who, for the same length of time, had actually operated a plant. His opportunities for practical knowledge, and his actual experience, might be much greater.

Finally, it is said that Gylstrom did not obtain a state license until just prior to his appointment. This fact has a bearing, but it is not conclusive. The statute in question does not make the eligibility of the appointee to depend upon when he has taken out an engineer's license, or whether or not he has ever had one. The test as to his qualification is actual experience in operating and suitable experience in constructing.

Our conclusion is that the writ should be quashed, and it is so ordered.

BUCK, J. (dissenting).

I dissent. In my opinion, the evidence completely fails to show that Gylstrom had at least 10 years of actual experience in operating steam engines and steam boilers. This is the test of his eligibility. It is not a question of the weight of evidence, but an utter failure to show the necessary qualification.

START, C. J. (dissenting).

I dissent. The office of inspector of boilers is a nonelective one, created by the legislature, which has the exclusive power to prescribe the qualifications of persons to be appointed to the office, and to restrict the appointing power to those possessing the prescribed qualifications. Neither the executive nor the judicial department of the state has any constitutional right to substitute other tests of eligibility in place of those prescribed by the legislature, although the substituted tests are equally as good, if not better, and result in securing competent officers. The statutory or legislative test in this case is this:

"No person shall be eligible to hold the office of inspector of boilers who has not had at least 10 years of actual experience in operating steam engines and steam boilers, * * * or who is not of good moral character, and suitably qualified by experience in the construction of steam boilers so as to enable him to perform the duties of the office." G. S. 1894, § 481.

The legislature, by this statute, prescribed three distinct qualifications which an inspector of boilers must possess. They are: (a) He must be a man of good moral character; (b) he must be suitably qualified by experience in the construction of steam boilers, so as to enable him to perform the duties of his office; (c) he must have had 10 years, at least, of actual experience in operating steam engines and boilers. That is, he must have had, prior to his appointment, not the equivalent, in the judgment of the appointing power, of 10 years' actual experience, but, in the aggregate, at least 10 years' experience in actually operating steam engines and boilers. Now, there can be no question in this case but that the respondent possesses the first and second of the specified qualifications, but as to the third test the evidence is conclusive that he never had 10 years', or any less number of years', actual experience in operating steam engines and boilers.

The evidence is summarized in the opinion of the court, and need not be here repeated; but it is to be noted that the whole of it, except the fact that when a boy 14 or 15 years old the respondent worked around steam boilers and engines in actual operation, generally assisting in firing, and that for six weeks he had exclusive

charge of and operated a small steam boiler and engine, is directed to establishing the fact that by his experience in making and repairing steam engines and boilers and in setting up steam plants he is suitably qualified to perform the duties of the office. It may be, and probably is, true, as suggested by the court, that by such experience and work he is better qualified for the office of inspector of boilers than he would have been if he had been engaged for 10 years in operating steam engines and boilers, but the fact remains that, in addition to the qualifications actually possessed by him for the office the legislature has ordained that he must bring himself within the third and absolute requirement of the statute by showing that he has had in the aggregate 10 years' actual experience in operating steam engines and boilers.

The legislature deemed this qualification to be of the first importance, and as to it left nothing to the discretion of the appointing power, but made it absolute. If there was any evidence in this case reasonably tending to support the conclusion of the governor that the respondent had had 10 years' actual experience in operating steam engines and boilers, the conclusion could not be set aside by the courts; but, as already suggested, there is no evidence or claim in this case that he ever did have 10 years' actual experience in operating them. The most that can be claimed from the evidence is that he has had the equivalent of such experience. To hold that he is eligible for this reason is to ignore the mandatory requirement of the statute, and substitute the discretion of the appointing power for the expressly declared will of the legislature.

BRENNAN LUMBER COMPANY v. GREAT NORTHERN RAILWAY COMPANY.

August 2, 1899.

Nos. 11,600—(57).

Fire—Verdict not Sustained by Evidence.

Evidence in this case considered, and *held*, that it did not sufficiently appear that the fire which destroyed plaintiff's property was traced or identified as having been started by the defendant.

Action in the district court for Pine county to recover \$130,000 damages for injury to plaintiff's property alleged to have been caused by a fire set by defendant's engine. The case was tried before Crosby, J., and a jury, which rendered a verdict in favor of plaintiff for \$67,554.46; and from an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Reversed.

C. Wellington, for appellant.

Clapp & Macartney and *L. H. McKusick*, for respondent.

RUCK, J.

This action was brought by the Brennan Lumber Company, plaintiff, about August 15, 1896, to recover of the defendant the sum of \$130,000 damages which it alleges it sustained on account of a fire running over plaintiff's land, and thereby burning and injuring pine timber and trees on said land, and destroying plaintiff's lumber camp thereon situate. It is also alleged that the fire originated September 17, 1891, on the line of defendant's railroad, by its train setting fire to dry grass, brush, and other inflammable material allowed by defendant to accumulate upon its right of way, and that the fire extended over intervening lands to the lands of the plaintiff, where it damaged said timber and trees. The different tracts of land are specifically designated in the complaint, and are within a territory about twelve miles north and south and about nine miles east and west, and all northerly and northwesterly of the Great Northern Railway. The allegations of the complaint were denied by the answer. When the testimony was closed, the defendant moved for a verdict to be directed in its favor upon certain grounds stated in the motion. This motion was denied. The jury then returned a verdict in favor of the plaintiff for the sum of \$67,554.46. Upon a settled case the defendant moved for a judgment notwithstanding the verdict, and, if that was not granted, then that it be granted a new trial. Motion denied, and it appeals to this court from said order.

The evidence is quite voluminous, nearly all upon two points: (1) As to the origin of the fire that caused the damage, and (2) as to the amount of damages.

From the view which we take of the case, we do not deem it necessary to discuss and pass upon the question of damages, as the pivotal question is that upon the evidence,—did it warrant the jury in finding a verdict in favor of the plaintiff? In order to do this, it must reasonably have tended to show that the fire which caused the damage for which plaintiff sues originated through the negligence of the defendant.

The timber and trees destroyed were pine, and that is the character of the trees in the surrounding territory. A better understanding of the geography of that region or territory can be had by taking the village of Hinckley as a basis therefor. The village is situate upon section 24, township 41, range 21, in the county of Kanabec. The defendant railroad runs in a southwesterly direction from Hinckley through this county, and in said village it is intersected by the St. Paul & Duluth Railroad, running north and south. Hinckley is situate on one of the extreme easterly sections of the governmental townships, nearly equidistant between the north and south lines thereof. About one-third of the land upon which this timber and the trees in controversy stood is in this governmental township, and in the northerly and northwesterly part thereof, and the nearest line of this main body of the land is between four and five miles from where it is claimed the fire started. The balance of the lands are in the following townships, viz.: Township 41, range 22, adjoining township 41, range 21, on the west, and adjoining the latter on the north is township 42, range 21, and west of this is township 42, range 22, and on the east township 42, range 20. Only about 500 acres of this land is in this last-described township, and is situate about three or four miles northeast of Hinckley. The most southeasterly land in township 41, range 21, is a separate 40-acre tract in section 20, about one and a half miles from the main body of land, and about four miles west of Hinckley, and nearly three miles northeasterly of the point where the plaintiff claims that the fire started which caused the damage. Township 41, range 22, directly west of township 41, range 21, contains only about 200 acres of this land, which is in section 2, and is about six or seven miles northwest from the defendant's road where the fire is claimed to have originated. The tract of this land near-

est to Hinckley is about three miles northwest therefrom in section 15, township 41, range 21. This consists of only 120 acres, distant from the main body about two miles.

In order to enable the plaintiff to recover in this action, it became necessary for it to trace the fire from the point where it alleges it started to its land where the damages occurred. To this end the plaintiff called as a witness Nels Mortinson, who lived in Hinckley in September, 1891, and was working for defendant under a section foreman by the name of Gorman. He testified as follows:

"I was working about four miles west of Hinckley. I saw fire come up there that day. As the freight came along, and went east, smoke came up right after it went. This was between bridges 83 and 84. There is a cut from 83 up. The train was going east. It is close to bridge 83, and crossing close to that bridge, nearer 83 than 84. The freight came along that afternoon. We saw smoke coming out. We went down on a hand car, and tried to stop that fire. There was a fire in a little crossing, I should judge about half a mile, or something like that, east of bridge 83; and the wind was pretty hard that day, and we could not stop it; it ran away; got outside the fence. I saw it immediately after the train passed. Saw no fire along the track anywheres before. I was working on the section all day, and was about a mile and a half from the point where the fire started. The track was spread. Don't remember exactly the other men who were there. One fellow's name is Newburgh; I remember that; and the other, I think, his name is Gorman, and his son. We all went down together on the hand car. * * * After the fire got away, we could not do anything. Mr. Gorman put me on to watch the track and the bridges. [Witness refers to map.] That was the same crossing. At this time there was no fire on the south side of the track on that section. I had been at work on the section two days before this. I went on the bridge to watch there that night. I saw no fire, only the same fire that got out, except on the next section there was a fire on the south of the section. I observed this particular fire during the night, burning. It burned the north side. The wind was from the south, drove the fire north. I was on the section the next day, and observed the fire burning. It was burning north; and the next night I observed it burning in the same direction. I don't know if that fire reached Hinckley or not; I can't tell. I can't exactly say how long I observed the fire going in a northeasterly direction. I remember seeing this fire for quite a few days after. It was going north, as far as I know, after it got out. The fire spread out, so I can't just exactly tell. After it got in there, it goes on both sides,—kind of spread out. In the two days I was working there before I saw this

fire start up I see no fire on the south side on that section. The section is between six and seven miles, and runs west about half a mile or three-quarters from the point where this fire started."

On cross-examination he testified as follows: "There is a creek down to Pokegama. There is a creek goes right through 83,—a small creek; and there is one up to Pokegama west of it. The place where the fire started was close to the creek on that section. East of the creek—I am clear that it started east of the creek, on Gorman's section—there is another creek we used to call 'Mission Creek.' That is east of 83. Don't remember how far it is. Can't exactly tell; it is a good while ago. The creek there on Gorman's section, called 'East Pokegama Creek,' that must be the creek. That must be the creek of 83 that was called 'East Pokegama.' Nelson's section ran right up to that bridge. That must be a mile and a half, I guess, a mile and a half east of Pokegama. We were raising and repairing the track. * * * The smoke was not very big. When we first came there, the fire was not very big. Gorman was on the hand car, and a man whose name was Newburgh, and myself. I watched the bridge that night; watched along there,—the track there; moved around, so I saw the fire did not get in there. * * * When I first went to work on the section, two days before this fire started, I observed a fire towards Pokegama. It appeared to be on the south side of the track. It was something we had between Pokegama and bridge 83; right in there between the two. That was east from the track. That was not into the track that I see. After the 17th, I saw smoke come from there, and it seemed to be getting up a little closer, and there was fire, either one or two days after, got right in there on the south side of bridge 83. That fire crossed the track, and went north. I don't remember when I stopped work on the section. I recollect of a fire being up around Hinckley, and I helped to fight the fire at Hinckley. There were fires coming in from the south there, and I helped to fight those fires. It was after September 17 that I went to fight the fire at Hinckley. It can't be over two or three days anyway after the 17th. The wind was blowing strong all the while mostly. Sometimes it was not going so hard. At another time it got up and drove it. In the nighttime it didn't blow very much then. From the 17th to the 25th of September there was smoke all over, south of the track and north of the track, and all around Hinckley; smoke to the east of Hinckley, and smoke to the north, too. It was a dry season, so far as I know."

The next witness called by the plaintiff, named Hawkinson, testified that one evening in September, 1891,—the date he could not state, he went with Mr. Gorman over his section to see the watchman of the bridge, Nels Mortinson, who was stationed six miles from Hinckley, and saw a fire on the north of the track, but could

not say how far it was from it, and saw no fire south of the track. The fire was about three miles from Hinckley. Never saw fire on the road but once. Could not say how far it was out from the road. Wind was from the south. Upon cross-examination he testified as follows:

"September, 1891, was dry; a very dry fall. Q. Were there not fires all around Hinckley during the early part of the month in the woods? A. Yes. I did not walk out much on the roads. Q. Weren't there fires all around in the woods? A. Yes. Q. When you went to see Nels Mortinson this night you speak of, three miles from Hinckley, there was no fire at all on either side of the track? A. I did not see any. Q. But at that time there was fire north of Hinckley in the woods? A. I did not see it up that way. Q. Do you know whether there was any fire in Hinckley? A. I didn't see it. Q. Do you know what time it was? A. I cannot tell what day it was. Q. After you went out there this night, did you ever see this fire down on the Great Northern road again, that you know of? A. No, sir. Q. Did you help to fight fire around Hinckley at all that fall? A. No, I didn't help. A couple of days I was out on the road we had fires in Hinckley. Q. A couple of days you were out where? Where did the fire that was in Hinckley come from? A. From the Mission creek, some place on the east side of the St. Paul & Duluth." Upon redirect examination: "Q. This fire that you speak of that you saw on the east of the St. Paul & Duluth road, when was that,—before you observed this other fire, the night you went down there, or afterwards? A. After that."

Mission creek is several miles south of Hinckley.

These two witnesses are the only ones testifying on behalf of the plaintiff who to any extent identify the fire in question, or saw it near the defendant's railroad track. It appears that the section of which Gorman was foreman extended six miles from Hinckley in a southwesterly direction, and ended at bridge 83, where it met Nelson's section running six miles beyond. Bridge 83 is directly south of the main body of plaintiff's land, and distant therefrom about four and one-half miles, and is the point where the fire came in from south of the railroad track and crossed it, about September 18 or 19, and went north in the direction of the plaintiff's main body of land. Mortinson testified: (1) That on September 17, 1891, just after defendant's train passed, he saw fire a half mile east of bridge 83 (this would be five and one-half miles from Hinck-

ley). (2) That on September 15, 1891, he saw a fire on the Nelson section, on south side of railroad track, which in two or three days after September 17 came in on the south side of bridge 83, crossed the track, and went north. (3) That two or three days after September 17 he helped fight fires at Hinckley, which came in from the south.

Here are three separate and distinct fires, all occurring about the same time; and, notwithstanding Mortinson's business was to watch fire all along the Gorman section, it is not shown by him whether the Hinckley fire was the one claimed to have been started by defendant's train, or whether any of the fires united, or where they went, except one went north, so far as he knew. Nor was any attempt made to show by this witness any definite or particular distance either of these fires went. In these particulars, which were material, no witness appears to have had the opportunity of Mortinson of observing these fires, and yet he says that he did not even know that the fire started by the train reached Hinckley at all. He could not tell, yet it was his express business to watch the track and bridges. His testimony was not materially strengthened by that of Hawkinson. If the plaintiff's case rested upon the testimony of these two witnesses, there would certainly be a complete failure to trace the fire in question to its source.

Was this lack of evidence supplied by the additional testimony of other witnesses? The principal damage was done by the fire on Tuesday, September 22, 1891. W. J. Cathcart, sworn for plaintiff, testified that about September 17 he saw a fire southwest of Hinckley, but did not then know where it was located. Somewhere about September 21, in the afternoon, it was in section 27, township 41, range 21. Saw fire there among some old cuttings. It was a slow fire, just smoldering along east and west as well as making north and south; and the next day a wind sprung up, and carried it north, and in all directions, and burned everything before it. He was in Hinckley at the time. He went to section 27, and went from there down to the defendant's railroad track to a point about half a mile or three-fourths of a mile from Hinckley. Says there was no fire north or south of Hinckley September 22. It does not appear that this witness saw any fire near the railroad

track, either on the north or south side thereof, when he came there from section 27; and he made no effort to trace the fire to its source, although his principal business was to look after plaintiff's timber.

F. B. Rowley, sworn for plaintiff, testified that on Sunday, September 20, 1891, he was down on the defendant's track about four miles, and observed a fire burning on the north side of the track, about 60 or 80 rods therefrom, and four miles west of Hinckley; but the fire was not running either way when he was there. It had run into a swamp of green tamarack, but west of him there was a big smoke north of the track. Where the fire was in the tamarack swamp it had run at least half a mile north of the track.

H. B. Davis, sworn for plaintiff, testified that he was vice president and general manager of the plaintiff, and owned one-fourth interest in the plaintiff company, which was operating a sawmill and planingmills at Hinckley in 1891. On September 17, 1891, he observed smoke down on the Great Northern Railroad southwest from Hinckley. Watched it grow larger from day to day. September 21 saw fire getting larger, and sent Mr. Cathcart to look after it, and later in the day went to look after it himself. The fire from the west came through heavy timber, and was 100 rods to half a mile from him, and about a mile and a half from Hinckley. Fire got into Hinckley on September 22, but did not remain long. Passed northeasterly on that day. Although he had been north of Hinckley several miles the day before, he saw no fires. Took no steps personally to trace this fire for several days, and then went west several miles from Hinckley, and then over other parts of the land where the plaintiff's timber was burned, and found the territory all burned over.

It is a notable fact in this case that, while this witness was heavily interested as a member of the plaintiff company, and started out to trace the fire to its source, he did not go within several miles of where plaintiff alleges it originated, and where the witness himself testified he had seen smoke several days southwest of Hinckley, and where the fire destroyed timber, and when he had as much evidence to satisfy himself as to the origin of the fire as at any time since. Whatever probative force there may be in his evidence

is weakened by his own conduct in this respect, and by the further fact of the long delay in not presenting his claim, or saying anything about it to the defendant, and especially in waiting until after the great Hinckley fire, which passed over this same scope of territory three years thereafter, and had obliterated very much, if not all, of the physical evidence of the origin of the fire. While plaintiff had a right to bring its action within the period fixed by the statute of limitations, yet its conduct, as appears from the record, may be considered as affecting the credibility of one of its principal owners, familiar with all the facts and a witness in the case.

William Kelly, sworn for plaintiff, testified substantially as follows:

Was building a dam for the Brennan Lumber Company in the month of September, 1891, on section 34, T. 42, R. 21, and fire struck me September 22. A couple of days before the fire I could see a little smoke in the pine timber, coming from nearly a southwest direction. The fire swept by me to the north.

Had not seen any fire to the east, north, or west of him. After the fire was over, he went south to section 4, township 41, range 21. The territory he went over was all burned.

Several other witnesses testified in behalf of the plaintiff as to territory where this timber was situated being burned over, and that they worked in the timber south of Hinckley subsequent to the fire, but saw no indications of a previous fire. None of them, however, traced the fire to the point where it is claimed by the plaintiff to have started.

We now come to an examination of the evidence introduced by the defendant. Thomas Gorman was its section foreman in September, 1891, on the first section running southwest from Hinckley, and which ended at bridge 83. He testified:

"My section runs from Hinckley west six miles. Stops at bridge 83. I remember between the 1st and 20th of September, 1891, of a fire being on the south side of the track. It crossed from the south side of the track to the north side at bridge 83. I remember of their fighting fire at Hinckley. * * * I had observed the smoke or fire on the south side of the track about eight or ten days, probably, before it crossed. This fire crossed at the noon hour.

We were on track repairs there. When that fire crossed there, it crossed the length of 10 or 11 telegraph poles. The telegraph poles are probably 200 feet apart; probably not so far. * * * I wanted to get down to the bridge, and I couldn't get through till the fire went by. The fire was too strong across, too hot; no man could get through, and live through it. The wind was blowing a pretty strong gale from the south,—blowing from the south. This fire had been burning a number of days south of the track. I know Nels Mortinson. Nels Mortinson had been working for me that month. Whether he had been working for me all that I could not tell. There had been some men working for me. I remember seeing a train going along that track, and, shortly after the train went along, of seeing smoke start up. That smoke started at bridge 87, about two miles, or a little over, west of Hinckley,—southwest of Hinckley. It would be about within three miles of bridge 83—probably three and a half miles east of bridge 83—where this fire crossed the track.”

He also testified that the smoke which he saw after the train passed did not come from the fire which came up and crossed the track at bridge 83.

John Stanchfield, a witness for defendant, also lived at Hinckley in September, 1891, and testified:

“In the month of September, 1891, I observed forest fires around Hinckley. Somewhere from the 5th—I can't place the date exactly, but between the 5th and 10th—I observed fire on the northeast of the northeast of section 13—41—21, somewhere about in this location [indicating], the northeast of the northeast of 13—41—21. The reason I saw it was I had on—I am not positive which quarter it was on—some three or four tons of hay in cock ready to stack. It was piled up there, and I was mad to see on that day a fire spring up on that section. Told my wife I was afraid of my hay out there. Went up after I ate my dinner. Found the fire got close to the Duluth Railroad, and it run in, working into this tamarack swamp, and was burning the swamp. The next day I got my hay out of there. The following Sunday from that day I was called up on the southwest of the southwest of 18 to a man that lived there, by the name of Michael Carey. The man he lived with then was burned up in the Hinckley fire in 1894. He sent a boy to my place, and wanted me to go up and help him fight fire, and save his hay; and that was on the west side of the Eastern Minnesota, in section 13. But we could not save his hay. His hay was burned up on that Sunday. Am certain it was the first Sunday after I saw fire break out. I am certain that the fire never was out between the St. Paul & Duluth Railroad for at least two or three weeks after this. I

saw the fire. Am certain the fire was in there. Saw it evening; saw it in the trees. * * * I remember September 22. With reference to that date, I was fighting fire on the south and southeast side of Hinckley at least a week or ten days prior to that time. I knew there was a fire at one time between the point of fighting fire there and the 22d, and I am positive that it was at least a mile and a half on the road that goes down,—follows the Grindstone river there east, down the course of the river. I went down there, and looked after some hay. And at that time—I think probably the 16th—I rode down there one evening, and the fire was on both sides of the road. * * * From the 1st to the 22d of September the condition of the ground was very dry. The atmosphere was dry. Usually all through that timber the mornings were very smoky; that is, for at least a week or ten days prior to the 22d it was a dense smoke; that is, in the morning,—every morning. During the nights and evenings of that week, or ten days prior to the 22d, I observed fires in the woods surrounding Hinckley. On the 13th and 14th I could not say whether they extended north of 12 or not, but in north of Hinckley and northwest of Hinckley. In the evening the fires would not be badly running. The wind would die down, and there would be dry trees, and that we would see from the house. It showed there was fire all through that country, in 13 and 14 at least. I did not go any further than the two sections 41—21."

Upon his cross-examination he testified that he observed the fire on section 13 from some day between September 5 and September 10 until September 26, and, as near as he could locate the same, it was on the northeast quarter of the northeast quarter of section 13, close to the St. Paul & Duluth Railroad, and was sure that the fire was not out for two or three weeks. The section 13 to which the witness referred is directly north of Hinckley, and between it and some of the timber of plaintiff injured by fire.

John McNamara, a witness for defendant, testified that he was section foreman for the St. Paul & Duluth.

"Was living, in the month of September, 1891, at Hinckley. Section foreman for the same road. * * * Was over that section during all the month of September, 1891. I observed fires north of Hinckley on the east or west side of the railroad track during the month of September between the 1st and 22d of the month. I saw a fire cross the eastern track,—cross from the Eastern Railroad up to 17 or 18, and into 24, and up to 13 along by 12, and along by the railroad track to section 1, and along through there. I don't think that fire crossed to the west side of the St. Paul & Duluth track. I

noticed fires on the west side of the St. Paul & Duluth track. Could not say about the time. It was in the month of September,—about the middle of September. I could not give date. The fire I observed on the west side was in sections 36 and 25, 36—41—21. Thirty-six is about four miles north of Hinckley. I saw a fire north of what is called the 'Big Hinckley Cut' on the west side of the track. It was about the middle of September. I recollect that Charles Peterson was working for me in the early part of September. He quit work between the 15th and 20th. Do not recollect the date. I observed these fires on both sides of the track previous to the time he quit work for me. * * * I saw a fire on the west side of the track about four miles from Hinckley. The fire that I saw about a mile and a half, in my opinion, never crossed the track. That was a separate fire. The fire that Peterson told us about was about a mile and a half up. I don't think it ever crossed the track. About four miles up was quite a fire. Burnt brush and tamarack and everything on the ground. There was a fire on the east side of the track at that point. It was on both sides. It was burning about a week altogether, on the east side. Couldn't say how long I observed it on the west side. I don't remember how long it was burning, but I saw the fire there. Further than that I don't remember anything particular about it."

Charles Peterson, sworn for defendant, testified as follows: He lived at Hinckley. Worked on section 14 with Mr. McNamara, for the St. Paul & Duluth, north of Hinckley. Between September 1 and the day he quit work, on the 17th or 18th of the same month, he observed forest fires north of Hinckley,—some time in the first part of September,—fire in a big swamp about a mile and a half north of Hinckley. It was on both sides of the track. The fire kept on going. Drove it off towards the northwest into the woods. When he quit work, on the 17th or 18th, that fire was, as far as he could see, burning in the woods north of Hinckley. Could see it climbing up dry pines, and lots of smoke. That he laid out nights to watch the fire east of Hinckley. That the fire on the north of Hinckley was about a mile and a half just the other side of the track.

N. A. Greenfield, sworn for defendant, testified: That he is a farmer, and lives in Dell Grove. Was there during all the month of September, 1891. Between the 1st and 20th he observed fires in the forest up in that country. That in September, 1891, he lived on section 25—42—21. That about the 9th or 10th fires were quite

bad south of him. Somewhere about the 15th or 16th the fire got quite bad south of him, and McNamara notified him he had better go away; he was in danger. That his wife and family did go away, but he stayed there. That his house was located about the middle of the S. E. of the S. E. of 25—42—21. Stayed to fight for his house. The fire burned into it; struck the high land. Was in the swamp when notified. That at the time his family moved from 25 to 24 there was fire burning on the west side of the St. Paul & Duluth track. That fire burned that day, through different portions of the country, to section 25. That he lost hay and other property by fires up there. Burned the day he left,—about the 15th or 16th. During the month of September, and prior to the 20th, there was smoke in anywhere that you could look. It was all smoke. He fixes the date by the birth of a child born on the 2d day of the month.

Henry Lund testified in behalf of defendant that in September, 1891, he was living on section 24—42—21, and that about September 15 or 16 he had seven stacks of hay destroyed by fire that came up from the south. Kept burning right along past him. He and a man by the name of Samuelson tried to stop it, but could not. It burned the low lands and marshes. Had a sawmill there, and was afraid, if the fire got in there, it would burn it.

Several other witnesses sworn on behalf of defendant testified as follows:

William Jacobs testified that he lived on section 7, township 42, range 20. Fire came in between September 1 and 20, 1891, from the south, and burned his hay, and there were fires burning from the first week in September to the east on the northwest and south of him.

H. G. Tyler testified that he lived on section 24, township 42, range 21, and that fire first came from the west to his place September 20, which he, with six or eight other men, fought with water, and put out the flames, but it burned in the underbrush, and the next morning it turned.

Warren Cathcart testified:

“Live at Hinckley, Minnesota. Common laborer. Was there in

the month of September, 1891, working for the Brennan Lumber Co., near Grindstone Lake, in John Bell's camp. He was cutting roads. Could not say in what direction. I was cookee,—helping the cook. Had to take dinner out in the woods to where the men were. Crew about 20. Commenced the last of the first week in September. Took dinner out for two weeks. About three miles, I think. The camp was by the end of the lake. It was dinner I had to take out. They would eat it between 11 and 12 o'clock. To prepare this lunch, when I found the men I would start a fire, and prepare the kettle. Did that every day. I took no pains to put out the fires as I started them. They were nearly burned out by the time the men got through dinner. Q. Did you notice ever, in passing over the route where you had built the fire the days before, or any number of days before, whether the fire had spread around? A. Yes, sir. Q. How far had it spread in any case you noticed? A. From four to six feet in diameter, spots as big as this room; only on one occasion saw a spot as big as this room. I needed to carry out lunch until camp burned. Was in camp when it burned. Think it was the day before I carried out lunch in this way to the men. Built a fire at that time, and left it as I had the other fires. The day before that, carried out lunch. Prepared tea, and built a fire, and left it. Was not back to the place I built the fire on the last day. Saw no evidences of fire in that country before the camp was burned up."

L. Y. Thydeen, on his cross-examination, testified for defendant as follows:

"I live on section 2—39—23, about a mile and a half from the Great Northern Railroad south, about 14 miles from Hinckley. Pokegama is eight miles from Hinckley. The fire reached my place on the 16th, going in a northeasterly direction. I know where that fire started. It started in section 22, town 29, range 23. I know when it started. It was on September 8. Am sure it reached me the 16th. I left my place on the 19th. I went first up to the railroad track, then followed the railroad track about a mile east from Mud Creek bridge. The whole distance would be two miles. I went up the road about two miles. Then went to where I saw the fire. It was east along the railroad line about the corner of section 25—40—23. I followed the track. I went first a mile and a half up to the railroad track, and then proceeded up the railroad track three miles. I stopped when I came to where the fire was. That is where I found the fire. Q. Before you got there, you could not see—could not judge—which side of the road the fire was on, could you? A. No, sir; I could not before I got nearer. Q. When you got up there, you found fire on both sides, did you? A. No; I found it on one side when I came there. It was on the south side.

That was on September 19. It crossed while I was there. The wind was blowing from a southwest direction. The fire proceeded as long as I saw it. I returned home. I started out two weeks afterwards. As far as I went on the 19th was to go about a mile and a half north, and then up on track two miles; then came home."

Numerous other witnesses testified in behalf of the defendant, tending in a greater or less degree to support its theory that there were other fires in the region of this timber from which the fire which destroyed plaintiff's timber might have originated, but the testimony is too voluminous to be further quoted. We have examined the evidence with great care, and we do not trench upon the province of the jury in permitting it to weigh conflicting evidence, and render a verdict accordingly, when such a case is presented. This, however, is not such a case, but one where it conclusively appears from nonconflicting evidence that the plaintiff failed to trace to its origin or source the fire which caused the damage to its timber. The language used by Justice Mitchell at page 192 in *Baxter v. Great Northern Ry. Co.*, 73 Minn. 189, 75 N. W. 1114, is quite pertinent to this case, viz.:

"Under such circumstances it was necessary that the fire should be carefully traced and identified by the evidence from the right of way to plaintiff's premises. The jury were not at liberty to arrive at the result by mere guess or conjecture, but must have had some substantial evidence on which to base their verdict. We have carefully read and studied the evidence, and are clearly of the opinion that there was no sufficient tracing of the fire, either by any one witness or by all the witnesses together, from the point where the sectionmen ignited the pile of ties and rubbish on the right of way, to plaintiff's premises. Neither was it traced by proof of facts and circumstances from which the inference could be legitimately drawn that it was the same fire. The most that can be claimed for the evidence is that it is possible that the fire started on the right of way might have been, in whole or in part, the fire which consumed plaintiff's property."

The plaintiff had ample opportunity to have traced this fire to its source immediately after it occurred. It was running its sawmill and planingmill at Hinckley at the time with a large force of men, not far from where the fire originated, and not far from the locus in quo of the damage. It had several lumber camps upon the very

land where the fire ran over its timber, and one of these camps was destroyed by the same fire as that which injured its timber. Davis, the general manager, says that when he received word from the various men that the fire had gone through there he took steps to trace it, but he never went near the place where he claims it originated, nor near the place where the fire started that crossed at bridge 83, and which went north in the direction of plaintiff's land. Nor did he send any one of his large number of employees to trace this fire to the place of its origin. The complex situation as to the various fires in that vicinity or region, and plaintiff's failure to trace this one to its source, must have left the case one where the jury could not, as a legitimate inference from all the facts, have rendered a verdict properly in favor of the plaintiff, and hence the order denying defendant's motion for a new trial is reversed, and a new trial granted. So ordered.

GEORGE BENZ v. CITY OF ST. PAUL and Others.

August 2, 1899.

On Application for Writ of Mandamus.

May 3, 1900.

Nos. 11,660, 12,222—(210).

Boundary Lines—Constitution—Amendment of Complaint—Mandamus.

The title of Laws 1893, c. 68 (G. S. 1894, §§ 5823-5829), reads as follows: "An act to provide for fixing and establishing boundary lines of land by civil action." The law itself provides that, when the lines and boundaries of two or more tracts of land depend upon any common point, line, or landmark, the owner or any person interested in any of such tracts may bring an action against the owners or persons interested in the other tracts to have all the boundaries fixed and established, and for this purpose the court shall try and determine any actual claim in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines involved. *Held*, that this law

is not unconstitutional, as embracing more than one subject, and this subject is expressed in its title.

Action in the district court for Ramsey county to have boundary lines fixed and established. The case was tried before O. B. Lewis, J., who made findings of fact and conclusions of law, and from an order denying a motion for a new trial, defendants (except the city of St. Paul, Rosa W. Kelly, William Louis Kelly, Annie McMillan and James T. McMillan) appealed. **Reversed.**

Stevens, O'Brien, Cole & Albrecht, for appellants.

Munn & Thygeson, for respondent Benz.

James E. Markham and Franklin H. Griggs, for respondent city of St. Paul.

William Louis Kelly, Jr., and McDonald, Kelly & Stobbart, for respondents Kelly.

BUCK, J.

The plaintiff owns lots 8 to 14, inclusive, in block 4, of Dawson & Smith's enlargement of Dawson & Smith's addition to St. Paul, Ramsey county, Minnesota. The lots front on Jackson street, in said city of St. Paul, and this block is bounded on all sides by public streets. The defendant Stevens owns lots 15 and 16 in said block, in the rear of plaintiff's said lots, fronting on Sherburne avenue. The other defendants are owners of other lots in said block, except the defendant city of St. Paul, which claims to have an easement in a portion of plaintiff's lots fronting on Jackson street.

It is alleged in the complaint that the lines and boundaries of the several lots in said block 4, and the streets surrounding the same, depend upon a common point, line, or landmark, and that the stakes marking the said boundaries were many years ago removed and lost without any fault of the plaintiff or of any person through whom he derives or claims title to said lots; and the original place of said stakes is not exactly or positively known. It is further alleged in the complaint that by reason of the uncertainty as to the exact location of the boundary lines of said block, and as to the Sherburne avenue, or southerly, line thereof, and as to how much the said block, when measured on the ground along said last-mentioned line, exceeds the length of said line as appears and as indicated on said

plat, none of the parties hereto knows the easterly or westerly boundaries of the land so claimed by him, her, or it, and no one of the parties knew the location or precise quantity of land to which he, she, or it is entitled in said block; and unless the said boundary lines of said block, and the easterly and westerly lines of said lots, as the same actually exist upon the ground, shall be determined by the court in this action as between all the parties hereto, many different suits will be needed and will be brought between the several parties to this action to determine the boundaries of the lots and parts of lots so claimed by them respectively.

Upon these alleged facts this action was brought under Laws 1893, c. 68 (G. S. 1894, §§ 5823-5829), to have the true location upon the ground of the easterly and westerly lines of said block, and the actual length upon the ground of said Sherburne avenue, or southerly, line of said block ascertained and fixed by the direction of the court, and monuments thereof duly established in accordance with the statute in such case provided. Also that, if there was a surplus in said block, that it be equitably apportioned. The separate answers of the different defendants raised various issues which were tried by the court. It was stipulated upon the trial that the lines of lot 19, as originally platted, had been constantly maintained by defendant Rosa W. Kelly, and that she had perfect title to all the land embraced within said lines. It was also stipulated that the plaintiff had like title to lots 8 to 14, inclusive; the defendant Hiram F. Stevens like title to lots 15 and 16; the defendant Laurence Minot like title to lots 17 and 18; the defendant St. Paul Title Insurance & Trust Company like title to lots 5, 6, and 7; the defendant Charles H. Petsch like title to lot 4; the defendant the Broadway Improvement Company like title to lots 2 and 3; and the defendant Annie McMillan like title to lots 1, 20, and 21, subject to the effect of a deed from her and her husband, James T. McMillan, to the defendant Rosa W. Kelly, of a strip between two and three feet wide off the easterly side of lots 20 and 1, which deed is of record in the office of the register of deeds of Ramsey county. It appeared that the defendant city of St. Paul, 12 years before the commencement of the action, took possession of a strip off the easterly side of the block, 19.19 feet wide at the southerly end and 12.16

feet wide at the northerly end, and has since occupied and improved it as a public street.

The plat (plaintiff's Exhibit A) and the testimony enabled the court to exactly define and adjudicate the title of all parties to the action to each tract in the block. In the findings of fact and conclusions of law the court omitted to do this, but went no further than to describe the plat attached to the complaint as Exhibit A, and to find that at the time of laying out the same the proprietors thereof caused to be platted and fixed at the corners of some of the lots therein and on the ground stakes and monuments, and that some of them became removed, and that there is not now, and there never has been, any difficulty in locating said addition or fixing the boundary line of any of the lots therein, as the same were originally laid out; also that the northerly, westerly, and southerly lines of the block are coincident with the lines of the streets as improved, and that the easterly line of the block extended as far easterly from Cedar street as shown upon Exhibit A. The court did not find anything with reference to surplusage. It found that the city of St. Paul, for a period of more than six years prior to the commencement of the action, had continuously possessed, used, and kept in repair as a public highway the strip above described.

As conclusions of law it was determined that, as between the plaintiff and the city, said strip had become a part of Robert and Jackson streets, and that, subject thereto, the plaintiff was the owner of lots 8 to 14, inclusive; that, as between the plaintiff and the other parties, except the city, "said other parties are entitled to judgment that this action be dismissed as to each of them"; that, save as aforesaid, the parties were not entitled to any relief. From an order denying the motion for a new trial upon the ground that the decision is not justified by the evidence, and is contrary to law, this appeal is taken.

So far as the determination of the trial court affected the rights of these appellants (one especially,—those of the defendant Stevens), we think it erred. The object of the law above quoted was under consideration in the recent case of *Stadin v. Helin*, 76 Minn. 496, 79 W. 537, and it was there said that the object of the act of 1893 is to provide a method of establishing disputed boundaries between ad-

joining landowners, and thereby determining their respective rights of property, and not merely to ascertain where the original government lines and corners were located. If the inquiry is to be limited to the latter, it is apparent that in many cases it would determine no right whatever; as, for example, where the parties by their acts have mutually agreed on and accepted a boundary line different from the original government line, or where one of them had or claimed to have acquired title by adverse possession to land on the other side of the government line. Hence section 5829 of the statutes provides that

“The court shall try and determine any adverse claims in respect to any portion of the land involved which it may be necessary to determine for a complete settlement of the boundary lines involved.”

It is clear that this statute was not intended to cover cases where the sole question was as to the title in fee, but for the court to try and determine adverse claims to the land, in order that the court might determine the true boundary line between the land of different owners; hence there is no merit in the contention of respondents' counsel that the law is unconstitutional because its title embraces more than one subject. The subject is also expressed in its title.

Nor is there merit in the point that the appellants are not aggrieved parties with the rights of appeal. The plaintiff brought this action under the statute for the very purpose which the appellants insist the court shall determine, viz., a settlement and adjudication of the boundary lines between the respective lot owners. The titles are admitted as between the parties, and the sole question to be determined by the trial court is the true location upon the ground of the different lots. The law provides that under the act every allegation in every answer shall be deemed in issue without further pleading; and the law further provides that in rendering judgment the court shall locate and define the boundary lines involved by reference to some well-known permanent landmark; and, if it is for the interest of the parties, the court may, after judgment, direct a competent surveyor to establish a permanent landmark from which future surveys shall be made. This section of the law

requiring the court to render judgment locating and defining the boundary lines involved is mandatory, yet the trial court, after hearing the evidence, which would have justified a finding as to the boundary lines between the parties, omitted to do so, and as between plaintiff and the other parties to the action save the city of St. Paul dismissed the action. Especially do we think that the defendant Stevens was entitled to have the line between himself and plaintiff established by full findings upon all the issues, and the rights of the parties fully determined as to the true boundary lines.

Cause remanded, with directions to the trial court to proceed and make additional findings as to the actual lines upon the ground between the land of the plaintiff, Benz, and that of the defendant Stevens, the evidence already introduced to stand, with authority to the trial court to take additional evidence, if necessary, to establish such lines between Benz and Stevens.

After the remittitur from the supreme court had been filed in the lower court, the proceedings mentioned in the following opinion were taken. The court, O. B. Lewis, J., having allowed an amendment of the complaint, the St. Paul Title Insurance & Trust Company and others petitioned the supreme court for a peremptory writ of mandamus directing the above-named judge to entertain the application of the petitioners and proceed either to amend the findings in accordance with their application or, if additional testimony were needed, to take such testimony and proceed to make additional findings. An order to show cause was granted. Petition denied May 3, 1900.

Stevens, O'Brien, Cole & Albrecht, for petitioners.

Munn & Thygeson, for respondents.

PER CURIAM.

Application for a writ of mandamus directing the respondent to execute the mandate of this court in the foregoing case, the application being in behalf of defendants other than the city and the Kellys.

As will be seen the action was under the statute, G. S. 1894, §§ 5823-5829, to have the boundary lines between the owners of the lots in a certain block fixed and established, and among these

owners were plaintiff, Benz, and defendant Stevens, whose lots adjoined. The court below after determining the rights of the city adversely to plaintiff's claim, dismissed the action as to the other defendants, refusing by such dismissal to fix and establish the boundary lines. From an order denying a new trial these applicants appealed and the cause was remanded, with directions to the trial court to proceed and make additional findings as to the actual lines upon the ground between the land of the plaintiff, Benz, and that of the defendant Stevens, the evidence already introduced to stand, with authority to the trial court to take additional evidence, if necessary, to establish such lines between Benz and Stevens.

Upon remittitur application was made for the additional findings referred to and thereupon the plaintiff asked to amend his complaint so as to set up, as expressed by defendants' counsel, "pretended equities to estop one of the relators from asserting the true line." The object of the action was to ascertain, fix, and establish the actual boundary lines between the lots in this block and, because this was not done, the cause was remanded for additional findings "as to the *actual* lines upon the ground between the land" of Benz and the defendant who specially objects to the proposed amendment. It was not remanded to establish the plat lines only. As we understand the amendment, which was allowed, the purpose is to introduce evidence tending to show where these actual lines are. It may not have been necessary to amend, but this is of no consequence. And it may be that even if the allegations of the amendment be proved it will not avail the plaintiff, but this is to be determined at the trial, not upon the application for a writ of mandamus. We fail to see that the court below disregarded the mandate when it allowed the amendment.

Order to show cause discharged.

JOHN McQUEEN and Others v. IRA W. BURHANS and Others.

October 5, 1899.

Nos. 11,617—(161).

Rescission of Contract—Fraud—Waiver by Delay.

In an action by the vendors to rescind a sale of real estate on account of the fraud of the vendees and of the vendors' own agent, and to compel the vendors to reconvey the property and to account for the proceeds of such of the property as the vendors had sold, *held*, that an unexcused delay by the vendors, after discovery of the facts constituting the fraud, of five years and three months, before rescinding or making any attempt to rescind, amounted, under the circumstances, to a waiver of the right to rescind, and to an implied ratification of the contract, notwithstanding the fraud.

Same—Ratification.

Mere delay to rescind, after notice or knowledge of the facts constituting the fraud, may be so long or unreasonable as to amount to a ratification.

Action in the district court for Ramsey county to rescind a contract for sale of land and other relief. The case was tried before O. B. Lewis, J., who found in favor of plaintiffs. From an order denying a motion for a new trial, defendants Jefferson and Kasson appealed. From orders denying a motion for a new trial and a motion to amend the decision and findings, defendants Burhans and Nichols appealed. Reversed.

Warner, Richardson & Lawrence, for appellants Jefferson and Kasson.

John B. Sanborn and *George P. Knowles*, for appellants Burhans and Nichols.

Frederick G. Ingersoll and *Asa G. Briggs*, for respondents.

BUCK, J.

A voluminous paper book of 2,073 pages, more than 100 assignments of error, and nearly 600 pages of briefs are submitted in this case for our consideration. As we view the case, the record contains a large mass of matter entirely unnecessary, and has imposed

upon this court a burden seldom if ever before cast upon it. However, we have patiently and carefully examined the entire record, and the briefs of the respective counsel, and arrived at the conclusion that a new trial should be granted the defendants. In view of this conclusion, it is proper that we state the grounds thereof.

All parties to the action waived a trial by jury, and the action was tried by the court. The controversy arose over the sale of certain real property situate in the city of Superior, in the state of Wisconsin, which property these plaintiffs had inherited from one John McQueen, who died in the year 1867, in the state of South Carolina, intestate. Sarah McQueen, one of these plaintiffs, is the widow of the said deceased, John McQueen, and the other two plaintiffs, who are brothers, are the children of said John McQueen and said Sarah McQueen. At the time when the transactions in controversy took place, the plaintiffs were residents of the state of Alabama, the defendants Burhans and Nichols resided at the said city of Superior, and the defendant Jefferson and his wife and Kasson resided at the city of St. Paul, in the state of Minnesota.

Jefferson claims to have purchased the real property in controversy of plaintiffs in good faith, for full value. Burhans claims to have sold a portion of the property, for Jefferson and Kasson, to other parties, for a commission upon the gross amount of the sale, and in an action in the United States circuit court obtained a judgment for such services, which judgment he assigned to the defendant Nichols. The wife of Jefferson only claims an inchoate interest in the property unsold. The defendants are all made parties because they claim to have an interest in the property and funds in controversy, or some portions thereof.

On September 19, 1889, and for a long time prior thereto, plaintiffs owned in fee simple certain real property situate in the city of Superior, in the state of Wisconsin; and on said September 19, 1889, they entered into a written contract with Jefferson and Kasson whereby they agreed to convey to them, by warranty deed, said property, for the sum of \$15,000 cash, which they did some time in the fore part of October, 1889,—the deed, however, being made to Jefferson. Subsequently, and between the time of making said deed and June 13, 1891, Jefferson and Kasson sold some 16 pieces of

said real property for \$54,750; leaving unsold, and the title now standing in the name of said Jefferson, 8 pieces of said property. which plaintiffs allege to be of the reasonable value of \$10,000. The trial court found that the value of the entire property at the time of its sale by plaintiffs to Jefferson and Kasson was not less than \$20,000, and it ordered judgment in favor of plaintiffs, and against Burhans, Jefferson, and Kasson, and each of them, for said sum of \$54,750, less the \$15,000 paid, and less \$748.73, taxes and assessments paid by Jefferson and Kasson; the sum for which judgment was so ordered being \$39,001.27, with interest on the various sums of purchase money for the respective amounts and from the date of the sales of the lots so made by Jefferson and Kasson. The trial court also ordered judgment that the plaintiffs were entitled to recover from the defendants the said real property which was then unsold, and that defendants Rufus C. Jefferson and Genevieve C. Jefferson, his wife, reconvey to plaintiffs the property remaining unsold, and adjudged that none of said defendants had any right, title, interest, lien, or claim in or to or upon the said real property so unsold, or any part thereof.

While Burhans had never received any consideration on the sale of said lots for the said sum of \$54,750, he was evidently held individually liable to plaintiffs therefor upon the theory that he, as their agent, fraudulently combined and conspired with Jefferson and Kasson to induce plaintiffs to sell their said property to the latter for much less than it was in fact worth, and that he actually participated in such fraudulent transaction for a valuable consideration paid him by Jefferson and Kasson. The court so found as a fact, viz., that Burhans was the agent and attorney of plaintiffs in negotiating the sale of their said property, and that he falsely and fraudulently represented to and advised them that said property was not then worth more than \$15,000, when in fact it was worth not less than \$20,000, and that plaintiffs then, in good faith, relying upon Burhans' said representations, conveyed said property to Jefferson. The court also found that, during the negotiations for the sale of said property, Jefferson and Burhans entered into a secret agreement between them whereby Jefferson was to pay or advance \$15,000 to buy said property only upon the condition that

Burhans should and would have control of the property and the sale thereof after the purchase of the same from plaintiffs, and should receive 30 per cent. of the net profits of such transaction. -

We do not deem it necessary to review the evidence, or pass upon the question of whether it sustains the findings of the trial court as to Burhans' agency and his fraudulent conduct, or whether Jefferson was an innocent purchaser of the property for full value, or fraudulently conspired with Burhans to obtain the property of plaintiffs for less than its reasonable value. Assuming that the findings in these respects are true, the serious question arises whether the plaintiffs were not guilty of such delay and laches after they had notice of the alleged fraudulent agreement of Burhans, Jefferson, and Kasson as to bar them from maintaining this action.

The action is one clearly for rescission of the contract, especially as to the eight unsold lots, alleged by plaintiffs to be of the value of \$10,000, the title to which still stands in the name of Jefferson; and it is none the less an action for rescission because the title to some of the lots which have been sold has passed into the hands of other, and probably innocent, persons. While plaintiffs seek to recover the consideration for lots sold by Jefferson, they nevertheless seek to have the deed cancelled so far as it concerns the unsold lots; and asked and obtained from the trial court an order for judgment for such cancellation, and direction that a reconveyance be made to plaintiffs of the said unsold property. Having elected to pursue this remedy, they, of course, are bound by such election. Now, in actions for the rescission of a contract of real estate, based upon the fraudulent conduct of the adverse party, the moving party must do so promptly after receiving notice of such fraudulent acts.

This leads to an examination of the evidence as to the notice which the plaintiffs had of the alleged fraudulent conduct of Burhans, Jefferson, and Kasson, and the time when such notice came to plaintiffs.

But little need be said as to the notice which the plaintiff Joseph P. McQueen, an able and experienced lawyer, had of all the alleged facts as to the fraudulent conduct of Burhans, Jefferson, and Kasson concerning said contract; for the court expressly finds that in November, 1892, he was informed of all thereof. This, it is to be

noted, was three years and two months after the making of the contract, and five years and three months before the commencement of this action. The evidence fully warrants this finding. The court further found that the other plaintiffs did not have such notice and knowledge, and had no means of ascertaining such facts, at any time prior to December 24, 1896, at which time they did discover them.

Taking up the matter of notice of the fraud to John McQueen, we find that in 1890, and from that time to the date of the trial, he lived at Birmingham, Alabama, and was during such time a practicing attorney, and had been so practicing for many years. It appears that in 1892 some trouble existed between Jefferson and Burhans as to the commission which the latter was to receive upon the sale of the property to third persons which Jefferson had purchased of the plaintiffs, resulting in a lawsuit between them, in which Burhans recovered a judgment against Jefferson and Kasson. A certain attorney, by the name of Shackelford, residing at the city of Superior, came into possession of the facts in regard to the original sale of the property by plaintiffs, and Burhans' sale of the property for Jefferson and Kasson, and his suit against Jefferson and Kasson, and communicated these facts to the plaintiff Joseph P. McQueen in 1892, and then also discussed the matter with John McQueen from half an hour to an hour, when the conversation was cut short by John McQueen's telling Shackelford to go and see McQueen's brother, Joseph P. McQueen, who had charge of the matter and had knowledge of all the facts. Shackelford did as suggested, and discussed all the facts with the brother. Considering that Shackelford's object in seeing the McQueens was to induce them to commence a suit against Burhans for his fraudulent conduct in the matter, his long conversation upon the subject with John McQueen, and his requesting Shackelford to go and see Joseph P. McQueen, who had charge of the matter, leads irresistibly to the conclusion that John McQueen had notice of all the facts of the alleged fraudulent transaction upon which the complaint herein is predicated.

Nor are we fully satisfied but that, under the general rule that parties seeking a rescission of a fully completed contract upon the ground of fraud must act promptly after notice, the other two plain-

tiffs, John William McQueen and Sarah McQueen, should be deemed to have been guilty of laches in their conduct in regard to the matter. It is conceded by plaintiffs' counsel, and found by the court, that in December, 1896, they did have notice of the fraudulent conduct of Burhans, Jefferson, and Kasson; and this suit was not commenced until June 23, 1897, six months after discovering the fraud. The rule seems to be universal that the party defrauded must act with great punctuality and promptness, and cannot be permitted to select his own time and convenience in exercising his right of rescission, and pursue a course which enables him to retain or recover the property if the markets should prove favorable, but, if the property greatly decreased in value, not rescind at all, and thus play fast and loose, and speculate upon an alleged fraudulent contract. "In such a case the mere fact that it does not appear that the other party has changed his position to his prejudice will not defeat the defense of laches."

Pomeroy, in his work on Equity Jurisprudence (volume 2, § 897), in discussing this question, says:

"All these considerations as to the nature of misrepresentations require great punctuality and promptness of action by the deceived party upon his discovery of the fraud. The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them to their original position. He is not allowed to go on and derive all possible benefits from the transaction, and then claim to be relieved from his own obligations by a rescission or a refusal to perform on his part. If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations."

Probably there are no adjudicated cases which clearly and fully define just what is meant by the term "promptness." A variety of circumstances may control in determining whether a party had acted with punctuality and promptness in rescinding a contract after notice of the fraud. One case might call for great promptness, while in another longer delay might be justifiable, but we think that the tendency of the courts at the present time is to hold

that the deceived party must act with greater promptness than formerly. A reasonable time, and no more, should be permitted after notice. An opportunity for investigating all the facts and to prepare the necessary papers for the commencement of an action for rescission would seem reasonable.

But in this case Joseph P. McQueen and John McQueen, two of the plaintiffs, and themselves experienced attorneys, had full notice of the facts in 1892, and the mother, Sarah McQueen, then lived with the latter, and until the trial of this action, and at a time when she discovered all the facts constituting this fraud; and it is not easy to conceive of a case where a better opportunity existed for promptly commencing an action for rescission than in this case of Sarah McQueen. It may be that the evidence does not show conclusively that she had notice of the fraud prior to December 24, 1897, although we think that there was ample evidence to infer that she did have such notice long prior to that date. Nor was the position of James W. McQueen such as to require delay in the investigation of facts necessary for him promptly to commence an action for rescission upon the ground of fraud. Two of his brothers, practicing attorneys, joint plaintiffs with him herein, knew all the facts as to the fraud, and could readily have communicated to him everything necessary for prompt action upon his part, and delay was unnecessary. John McQueen and James W. McQueen lived at the same place, and we find no reasonable excuse why this suit was not commenced sooner. The evidence is well-nigh conclusive that James W. McQueen and Sarah McQueen were also guilty of such laches as to bar them from maintaining this action.

The following cases illustrate the tendency of modern courts to hold parties to great punctuality and promptness in moving to repudiate in cases of fraudulent contract, after notice of the fraud:

In *Wheeler v. Robinson*, 86 Hun, 561, 33 N. Y. Supp. 921, it was held that it is the duty of a grantee, if he desires to repudiate a conveyance of property to him, and the giving of a mortgage by him to secure the purchase price thereof, on account of the false representations of the grantor, to do so as soon as the fraud is discovered by him.

In the case of *Byrd v. Rautman* (decided April 1, 1897) 85 Md. 414,

36 Atl. 1099, it was held that a party who seeks to have an executed contract rescinded on the ground of fraud must be guilty of no unnecessary delay, and that a bill filed for such purpose more than three years after the contract was made, and a year after plaintiff acquired full knowledge of all the facts, will be dismissed because not filed within a reasonable time, and that the party must elect to repudiate the contract at once upon the discovery of the fraud, and be guilty of no unnecessary delay in coming into a court of equity for relief; citing *Wenstrom v. Purnell*, 75 Md. 113, 120, 23 Atl. 134.

In the case of *Hallahan v. Webber* (Sup.; decided June 29, 1896) 7 App. Div. 122, 40 N. Y. Supp. 103, it was held that the right of a seller to rescind on the ground that she was induced to make the sale by false representations of the buyer is waived by delay in waiting from April 9, 1894, when she became aware of the fraud, until July 10, 1894, before she commenced the action. It is true that this was a case relating to the sale of goods, but it is supported by the court citing *Hammond v. Pennock*, 61 N. Y. 145, and *Schiffer v. Dietz*, 83 N. Y. 300, which were cases relating to fraudulent rescissions of sales of real estate.

In so far as the doctrine of laches is applicable to any of these plaintiffs, it must be noted that the case is an exceptional one,—rendered so by the speculative character of the property sold by them in 1889, during what was known as “boom times,” and subject to great contingencies. That the property, as to price and value, was precarious and speculative, is fully evidenced by the finding of the trial court as to its value of \$20,000, and its subsequent sale in part within a year or so for a large sum, while one-third remains unsold. And the evidence generally upon this point shows clearly its speculative character at that time. Now, it was said in *Williams v. Rhodes*, 81 Ill. 571, and in *Connely v. Rue*, 148 Ill. 207, 35 N. E. 824, that a delay which might have been of no consequence in an ordinary case may be amply sufficient to bar the title to relief where the property is of a speculative character or is subject to contingencies, or where the rights or liabilities of others have in the meantime been varied. If the property is of a speculative or precarious nature, it is the duty of the party complaining of the fraud to put forward his complaint at the earliest possible time. He cannot be

allowed to remain passive, prepared to affirm the transaction if the concern should prosper, or to repudiate it if that should prove to his advantage. Kerr, F. & M. (Bump Ed.) 306, 307.

But there is another phase of this case which should not be overlooked or disregarded. A new trial must be granted as to Joseph P. McQueen and John McQueen, should a new trial be granted as to the other plaintiffs.

The suit is an equitable one, and the court has jurisdiction of all the parties and the subject-matter. All parties plaintiff voluntarily brought the action jointly. They seek to recover a joint fund, and have a joint rescission of a joint contract in regard to the sale of real estate. Upon the trial they all insisted and have continually insisted, that the doctrine of laches was not applicable to any one of the plaintiffs, nor to all of them, while the defendants insist upon a contrary doctrine. The trial court found that Joseph P. McQueen more than five years before the commencement of this action had notice of all the facts constituting the fraud, but made no findings as to his laches, and disregarded this question as to all of the plaintiffs. This question, vital as to all parties, seems to have been ignored by the trial court, and the case was tried upon the sole theory that fraud only was involved.

There is no doubt but that the plaintiffs were proper parties, for they all had a common right and interest in the real property which they had jointly conveyed away, and in the contract which they now seek to have rescinded as to the unsold property. They also have a common and joint interest in the fund which they claim was received on the sale of part of the lots. That fund they seek to recover, and that their community interest therein be determined. If upon a new trial one or more of the plaintiffs recover and the others are defeated, it will be the duty of the court to divide the fund by its decree, and make a proper division thereof, and properly apportion the costs and disbursements, and make and pass upon the question of the allowance of the sums paid by the defendants as taxes and assessments. How far this sole theory upon which the trial court proceeded may have affected the entire result, as against the defendants, it is difficult, if not impossible, to discover. The question of laches was a pivotal point as to the defendants, as was the ques-

tion of fraud to all parties. Trying a case and basing the result upon one theory alone, when other vital issues are involved, but utterly ignored, may be, and we think in this case was, judicial error, for which, under all the facts, a new trial should be granted as to all parties, and upon all the legitimate issues. As a new trial is ordered as to Burhans, Jefferson, and Kasson, it follows, as a matter of course, that the same order should be and is made as to the defendant Nichols.

The order of the trial court denying the defendants' motion for a new trial is reversed.

MITCHELL, J.

In concurring in the result arrived at in the foregoing opinion, I wish to state briefly the grounds upon which I have arrived at this conclusion.

While in one sense this action is one to enforce a constructive trust, yet it is essentially an action by a vendor to rescind a sale on the ground of the joint fraud of the vendee and of the vendor's own agent. The rights of the plaintiffs, if any, all depend upon and grow out of the right of rescission, hence the action is controlled by the rules of law applicable to the subject of the right of the rescission of contracts on the ground of fraud. The distinction must be kept in mind between an action for damages and one for rescission. The property (a number of lots in Old Superior) had for many years remained unimproved, unproductive, and virtually unsalable. Its value was wholly speculative and prospective. The sudden and wild "boom" which enabled Jefferson and Kasson in less than two years to sell the larger part of the property for so great an advance over what they paid for it had not yet arrived, although some things then existed which men might or might not (according to their past experience or natural temperaments) have considered signs of a coming "boom." Burhans' statement as to the value of the property was made before Jefferson and Kasson appeared on the scene, and, so far as appears, before they were thought of as possible purchasers of the property. Under such circumstances, I very much doubt whether there is any evidence to justify the court in finding that Burhans' statement as to value was fraudulent, or anything but an honest expression of opinion.

It seems to me, therefore, that for their right to rescind the plaintiffs have to stand upon the propositions—First, that the relations of trust and confidence between them and Burhans, as their agent, were such that his taking an interest in the purchase without their knowledge was a constructive fraud upon them; and, second, that Jefferson and Kasson had knowledge of facts sufficient at least to put them upon inquiry as to the relations between plaintiffs and Burhans, and hence that they were chargeable with notice of the fraud. I assume, without discussion, that the evidence was sufficient to justify the court in finding in favor of the plaintiffs on both these propositions. The finding of the court, supported by conclusive evidence, is that the plaintiff James P. McQueen had notice of all the facts constituting the fraud as early as November, 1892. In my opinion, notwithstanding the finding of the court to the contrary, the evidence was also conclusive that the plaintiff John McQueen had the same notice at the same date. At this time the sale was already over three years old. No claim was asserted, or any notice given that any would be asserted, against the defendants for some four years, and no suit was brought to rescind, until over five years after these two plaintiffs obtained knowledge of the facts. Neither was any excuse for nor explanation of this delay given. I think this amounted to a waiver of the right to rescind, and to an implied ratification of the sale notwithstanding the fraud.

The contention of the plaintiffs is, in substance, that, where there has been no affirmative act of ratification of a contract voidable on the ground of fraud, no mere delay, however long, short of the statute of limitations, will amount to a ratification or a waiver of the right of rescission, unless the other party has in the meantime, by reason of the delay, been misled, or has changed his position to his prejudice. And it is urged that in this case the plaintiffs have never affirmatively ratified the sale since their discovery of the facts, and that the defendants have in no way changed their position since such discovery in November, 1892. I do not think that either principle or the weight of authority will justify so broad a statement of the law.

The courts have always refused to lay down any hard and fast rule on the subject, but have left each case to be determined largely

upon its own particular facts. In treating of the subject of the rescission of voidable contracts, they have usually laid down the reasonable rule that a party must rescind, or at least give notice of his intention to do so, within a reasonable time after discovery of the facts giving the right to rescind. And, in my opinion, under many circumstances there may be and are cases where mere delay and silence after discovery of the facts may be so long and unreasonable as to amount to an implied election to waive the right to rescind and to ratify the contract. Acts of omission frequently speak as loudly as those of commission. This, I think, is just such a case, at least as to the plaintiffs James P. and John McQueen (themselves experienced lawyers), especially considering the speculative and fluctuating value of the property which was the subject of the contract. And who can say that Jefferson and Kasson have not been prejudiced in more ways than one by the delay? It at least appears that in the meantime they have been engaged in protracted litigation with Burhans as to the amount of his share in the proceeds of the property, which has resulted in a large judgment against them.

It follows that defendants are entitled to a new trial, at least as to two of the plaintiffs. Without considering the evidence as to the other two, I think, for reasons suggested in the opinion, the proper disposition of this appeal is to grant a new trial of the whole case as to all of the plaintiffs.

CANTY, J.

I concur with Justice MITCHELL.

LONDON & NORTHWEST AMERICAN MORTGAGE COMPANY
v. H. GIBSON.

October 5, 1899.

Nos. 11,697—(221).

City of St. Paul—Local Improvements—Testing Validity of Sale—Statute of Limitations.

Sp. Laws 1880, c. 32, § 50, relating to sale of real property situate in the city of St. Paul for nonpayment of assessments for local improvements, provides that "no sale shall be set aside, or held invalid, * * * unless the action in which the validity of the sale shall be called in question, be brought, or the defense alleging its invalidity be interposed within three (3) years after the date of the sale." *Held*, that the limitation contained in Sp. Laws 1880, c. 32, § 50, applies to actions brought to set aside the sale of real property in the city of St. Paul for the nonpayment of assessments for local improvements. But as the defendant did not rest on this statute, but, by counterclaim, claimed and obtained an adjudication on the merits that he was the owner of the property under a deed issued on such a sale, the validity of the deed under which the defendant obtained this judgment is involved, and must be determined on the merits.

"De Minimis."

The maxim, "De minimis non curat lex," applied to a tax sale.

Publication of Notice of Sale.

Publication of a notice of tax sale is not invalid because such notice is embraced in an advertisement with other judgment notices of the tax sale of different lots for nonpayment of delinquent taxes.

Case Distinguished.

Security Trust Co. v. Von Heyderstaedt, 64 Minn. 409, distinguished.

Action in the district court for Ramsey county to determine adverse claims to land. The case was tried before Otis, J., who found in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. *Affirmed*.

W. H. Yardley and Oscar Hallam, for appellant.

James E. Markham and Franklin H. Griggs, in behalf of city of St. Paul.

BUCK, J.

This action was brought to determine adverse claims to lots 10, 11, and 12 in block 37, West St. Paul Real-Estate & Improvement Syndicate, No. 2, according to a plat thereof on file in the office of the register of deeds of Ramsey county; the plaintiff claiming to be the owner in fee of said lots, which lots are, and for a long period have been, vacant and unoccupied. This claim is denied by the defendant, and he claims to be the owner in fee of said lots, and bases his ownership to said lots upon a certain deed of conveyance from the city of St. Paul, dated March 13, 1897; and he alleges that certain recitals in his deed are true, and makes said deed a part of his answer. He also alleges in said answer that, if the plaintiff had any cause of action against him, it is barred by the statute of limitations, as it was not commenced within three years after the sale of said premises. In its reply the plaintiff admits the execution of said deed by the city of St. Paul to defendant, and its recording in Ramsey county, but alleges that said deed is void and of no effect because of divers irregularities and violations of law in the proceedings under which the same was issued.

There is no question but that the deed was issued pursuant to what is claimed by the defendant to have been a sale of the premises to pay a local assessment for the grading of Stickney street, in the city of St. Paul, Ramsey county, in this state, under a judgment directing such sale. It is admitted that the deed set out in the defendant's answer is the one upon which he relies for his title. Numerous points are suggested by the plaintiff's counsel, going to the irregularities and invalidity of the sale, which it is claimed rendered it and the deed in question invalid. The trial court, as a legal conclusion from the facts found, held that the plaintiff was not entitled to any relief, and that the defendant was entitled to judgment establishing his title to the premises; and from an order denying plaintiff's motion for a new trial it appeals to this court.

The defendant raises the question that the action was not seasonably brought. Laws 1887, c. 60, § 3, provides that

"An action to set aside and cancel such sale may be commenced at any time."

This refers to certain sales made under the general tax laws of the state, and is the last clause of section 1594, G. S. 1894. But the legislature, by special laws of 1889 (chapter 32, § 50), provided that

"No sale shall be set aside, or held invalid, * * * unless the action in which the validity of the sale shall be called in question, be brought, or the defense alleging its invalidity be interposed within three (3) years after the date of the sale."

We find no other law bearing upon this question of limiting the time in which actions of this character must be brought. The sale of the lots in question under the judgment above referred to took place February 23, 1892, and this action was brought in December, 1897, nearly six years after the sale. It is to be noted that the special law of 1889 fixing the time within which suits must be brought to test the invalidity of a sale made for nonpayment of the amount due on assessments for local improvement was passed two years subsequent to the law authorizing suits to be brought at any time to set aside and cancel a sale made under the general tax law of the state.

An examination of the charter of the city of St. Paul leads to the conclusion that there is much reason why such action to test the invalidity of the sale should be brought within three years from the date of the sale. A party owning such property has five years from the date of sale in which to redeem the same, and, if a third party purchases the property at such sale, it is a sound policy which requires that the action to test the invalidity of the sale be brought and determined before the time for redemption expires, in order that the purchaser may know whether he is to have a valid deed or not, and also that the owner of the premises may know whether the sale is valid, in order that he may determine whether he is compelled to redeem from a valid sale, or may lawfully resist redemption from an invalid one. In *Bower v. O'Donnall*, 29 Minn. 135, 12 N. W. 352, it was held that an action brought in 1881 to set aside or test the validity of an actual tax sale made in 1875 upon an actual tax judgment is barred by the five years limitation provided in Laws 1875, c. 5, § 30, by which the time of bringing such action is controlled. We are of the opinion that the special law of 1889 (chapter 32, § 50) controls this case; that the action of the

plaintiff was not seasonably brought, and is barred by the provisions of said special law.

The rule applies to this particular remedy sought to be enforced herein, but not to the property itself, under the doctrine laid down in *Baker v. Kelley*, 11 Minn. 358 (480). And the defendant, evidently having in mind and relying upon the rule laid down in that case, does not merely rest on the defensive, by pleading the statute of limitations as a bar to the remedy herein sought by the plaintiff, but sets up a counterclaim alleging title in himself by virtue of the tax deed, and asks that the title be adjudged in him, and this relief the court granted; hence this case must be determined upon its merits, and involves an adjudication of the validity of the tax deed under which the defendant, Gibson, claims title to the lots in question. The court appears to have had jurisdiction of the subject-matter and of the parties; and as the judgment stands upon the same footing as other judgments of the district court, controlled only by such distinctions as are created by statute, all points raised as to proceedings prior to the entry of judgment must be deemed as a collateral attack upon the judgment, hence we need not consider them. *Hennessy v. City of St. Paul*, 54 Minn. 219, 55 N. W. 1123.

It is claimed that the notice of sale was void because notices of other sales under 25 different judgments were embraced in one advertisement. Upon this branch of the case the city charter provides that the said advertisement so to be published in each case of a judgment upon any collection warrant and report as aforesaid shall contain a list of the delinquent lots and parcels of land to be sold; the names of the owners, if known; the amount of judgment rendered thereon, respectively, and the warrant upon which the same was rendered; the court which pronounced the judgment; and a notice that the same will be exposed to public sale at a time and place to be named in said advertisement. Upon an examination of the notice of sale appearing in the paper book, we find that it conforms to this requirement of the city charter. Such a notice is ample, and not misleading or injurious to the owner of the lots, as well as a great saving of expense.

It is also claimed that the sale was made for less than the amount of the judgment, with costs and interest to the day of sale. The

judgment was rendered January 30, 1892, for \$628.03; interest to time of sale is stated to be \$4.19; costs to time of sale, 50 cents; total, \$632.72. The sale was made February 23, 1892, for \$632.72. The error complained of is that the interest claimed (\$4.19) upon the judgment from the time of its rendition, January 30, 1892, up to the day of sale, February 23, 1892 (24 days), is less than the amount required by law, and hence that the sale is void; citing *Security Trust Co. v. Von Heyderstaedt*, 64 Minn. 409, 67 N. W. 219. The real difference between the amount of interest actually due on the judgment at the time of sale and that which was in fact added to it, and for which the property was sold, is 75 cents. Does this difference vitiate the sale?

The difference, when compared with the amount of the judgment, \$628.03, seems trivial,—something less than 12 cents on the \$100. In the *Security Trust Co. v. Von Heyderstaedt* case, cited by counsel, the assessment against the lot was \$17; the amount of the judgment was \$18.46; the judgment, interest, and costs to day of sale, \$19.38; the lot was sold at tax sale for \$17. It is self-evident that the amount of interest and costs was not added to the amount for which the lot was sold at tax sale. They were entirely omitted, and the lot was sold for the amount of the judgment, not even including any interest or costs, but only for the amount of the original assessment. It is apparent that such a sale could not have been made, based upon any error or mistake in the computation of interest or ascertainment of costs, as each one is entirely omitted, and the officer selling utterly disregarded the law, not for a trivial amount, but, relatively, for a considerable sum, as a simple computation readily shows.

The authorities are somewhat divided upon the question whether the maxim, "*De minimis non curat lex*" ("the law cares not for small things"), is applicable to tax sales. It is the theory of those who insist that this maxim is not applicable to such sales that taxes are imposed upon the citizen against his will, that such a law should have no favors shown it, that it is the general rule that tax laws are strictly construed, and that this construction is of universal application when the property rights of the citizen are involved, and that especially such rights should not be affected by the application

thereto of such a vague and uncertain maxim. Finespun theories are sometimes very plausible, and the citizen occasionally resorts to them to avoid the performance of a public as well as a private duty. But such theories must yield to practical common sense and substantial justice.

However, assuming the general rule to be that tax laws must be strictly construed as to their operation upon those thereby affected, we are not disposed to confine in every case the words and phrases of the statute to their literal and ordinary signification. Statutes are to be construed so as best to effectuate the intention of those who made them, and such intent should not be defeated by a too strict adherence to the very letter of the law. While the citizen has a right to invoke the protection of the law when the officers of the state attempt by judicial proceedings to compel him to pay his share in carrying on the governmental functions, it is not very easy to see just why he should be dealt with more liberally than when his own private obligations are being enforced. It is true that a tax is a burden, but it is a burden imposed for the very lifeblood of the state. It is an attribute of sovereignty, possessed for the purpose of promoting the public welfare. And through this power the citizen is protected in his life, liberty, and property. Why should he, as a laggard, delinquent taxpayer, be treated any more leniently, or be solely exempt from the application of this wise maxim, than he would be when other business relations with his fellow citizens are involved?

In *Colman v. Shattuck*, 62 N. Y. 348, where the tax collector returned four cents too much, this maxim was applied; and substantially the same rule was applied in *Havard v. Day*, 62 Miss. 748. Reason and common sense are to be used in tax cases as well as in others, and we should not discard these aids which guide us in other cases, if they operate to the security of the citizens. 1 Blackwell, Tax Tit. § 474. To hold that such trivial and unintentional mistakes in the computation of interest by a public officer as appears in this case invalidates a tax sale would doubtless lead to endless litigation, possibly to great public loss, without any intrinsic merit in the legal proceedings. The judgment was entered in favor of the city of St. Paul, and the lot sold for its benefit; and, although it sold

for 75 cents less than the amount due, it does not complain, but asks that the sale be adjudged valid. The plaintiff, as owner of the lot, was not in any way injured by the sale, for it was sold for an amount less than the law required. The judgment was a valid one, rendered by a court of competent jurisdiction, and the tax sale a substantial compliance with the law; and, under the circumstances, we apply the maxim, "*De minimis non curat lex.*"

It is said, however, that in doing so we hold adversely to *Security Trust Co. v. Von Heyderstaedt*. The facts in that case were different from those in the one at bar. There the difference between the amount of the judgment and the interest and costs which should have been added, and for which the property should have been sold at tax sale, and the actual amount of the tax sale, was substantial and large, as compared with the amount of the judgment. But we do not overrule or modify the decision in that case. The language of the justice writing the opinion was general in its character, and did not involve a consideration of the rule where this maxim could appropriately be applied.

We find no errors in the record, and the order appealed from is affirmed.

CANTY, J.

I concur in the result arrived at in the last part of the opinion, for the reason that while the maxim, "*De minimis non curat lex,*" applies in the case of a tax sale, yet, as tax proceedings are construed strictly against the party claiming under them, the maxim is applied with more strictness and to a more limited extent in such cases than in others.

On Motion for Reargument.

November 2, 1899.

PER CURIAM.

On motion for reargument, appellant insists that the notice of sale given by the city treasurer was void because it and 24 other notices of sale under 24 other tax judgments were all embraced in one published notice, and that this is prohibited by Sp. Laws 1889, c. 32, subc. 7, tit. 1, § 30, which reads as follows:

"Two (2) or more of the notices required or authorized by this act to be given by the board of public works or the city clerk, by publication in the official paper of the city, in any special assessment proceedings, may be comprised in one (1) advertisement. Provided, however, such notices are of the same general character, or for like object. And, provided, that in other respects the notice so published shall sufficiently comply with the essential statutory requirements. And the provisions of this section shall extend to, and embrace all notices required to be given in the official paper of the city, by the city treasurer, or the delivery to him of all special assessment warrants for collection, and of his intended application to some court of general jurisdiction for judgment thereon provided for by this chapter."

It will be observed that while this section provides that all notices to be given by the board of public works and city clerk, and notices of the receipt by the city treasurer of assessment warrants, may be given as in that section prescribed, it does not provide that other notices to be given by the treasurer (amongst them, notices of sale under tax judgments) may be so embraced in one published notice.

Appellant contends that the rule, "The expression of one thing is the exclusion of another," should be applied here, and it should be held that this section impliedly prohibits the giving of other notices in that manner. We cannot so hold. The substance of this section of the charter of St. Paul has existed from an early date. We have traced it back as far as 1874, but did not look further. See section 30, p. 64, Sp. Laws 1874. Other portions of the city charter have since been many times amended so as to provide for the publication of many notices for which no provision existed in the charter at or prior to that date. This section 30 has since been amended a few times, but not enough to cover all of the different notices required by other portions of the charter to be published. In fact, the whole charter is largely made up of patchwork. Under these circumstances, we cannot apply the rule of interpretation contended for by appellant; but must hold that the notice here in question was properly published, notwithstanding the peculiar provisions of the section.

Motion for a reargument denied.

AMERICAN SURETY COMPANY OF NEW YORK and Another
v. JOHN P. NELSON.

October 11, 1899.

Nos. 11,746—(38).¹

Removal of Assignee—Nonpayment of Premium—Laws 1895, c. 295.

The failure to pay the agreed fee or premium to a corporation acting as surety on the bond of an assignee in insolvency is sufficient ground, under Laws 1895, c. 295, for the removal of such assignee.

Same—Corporate Surety.

Held, that act applies as well to such a corporation as to a personal surety.

Acceptance of Part Payment—Waiver.

During the pendency of the proceedings to remove the assignee he paid a part of such fee or premium, which part had been earned, and was absolutely due. *Held*, the surety, by accepting such payment, did not waive its right to have the assignee removed.

Order of Removal—Practice.

Held, the order removing the assignee is not erroneous because a prior order requiring him to furnish a new bond within 30 days was made *ex parte*, as on the hearing of the petition to remove him he was still entitled to be heard as to the propriety of such former order.

Appeal by John P. Nelson, assignee of Andrew G. Peterson, insolvent, from an order of the district court for Hennepin county, Pond, J., removing said assignee and appointing Charles M. Drew in his stead. Affirmed.

A. B. Darelius, for appellant.

Childs, Edgerton & Wickwire, for respondents.

CANTY, J.

In May, 1896, one Peterson made an assignment for the benefit of his creditors to the appellant, Nelson, who accepted the trust, gave bond with the respondent the American Surety Company of New York as surety, and entered upon the discharge of his duties. He agreed to pay the surety company \$35 per year, in advance, as compensation to it for acting as such surety. He failed to pay the

¹ October, 1899, term.

premium in advance for the year commencing May 28, 1898, and for some time prior thereto, and the surety company petitioned the district court to require Nelson to furnish a new and satisfactory bond. The court made an *ex parte* order requiring him to do so within 30 days. He failed to comply with the order, and thereafter the surety company petitioned the court that he be removed. After a hearing on the petition, the court made an order removing him, and he appeals from the order.

Laws 1895, c. 295, provides:

"The surety or sureties * * * upon the bond of any public officer, * * * assignee, receiver, * * * may upon application duly verified stating the reasons therefor to the * * * court * * * be discharged from further liability as such surety, said * * * court, * * * shall by order reciting such application require such * * * assignee, receiver, * * * to furnish a new and satisfactory bond, within 30 days after personal service of such order. * * * If any such officer * * * upon being ordered to furnish a new bond as aforesaid shall fail to comply therewith he shall be removed, and be compelled to render and settle his accounts as soon as practicable."

1. We are of the opinion that the failure of Nelson to pay to the surety company the agreed fee or premium for acting as such surety was sufficient ground for requiring him to furnish a new bond, and for his removal on his failure to furnish the same.

2. We are also of the opinion that the act applies as well to a corporation surety as to a personal surety.

3. While the proceeding for the removal of Nelson was pending, the surety company, on December 31, 1898, accepted from him \$10 in full payment of all the fees due for the time prior to May 28, 1898. But \$35 was due in advance for the year commencing on that day, and he has never paid the same, or any part thereof. In our opinion, the surety company did not, by accepting the \$10, waive its right to have Nelson removed. It accepted nothing but what was absolutely due it, whether he was removed or not.

4. Appellant contends that the court erred in making the *ex parte* order requiring him to furnish a new bond. We cannot so hold. Conceding, without deciding, that he was entitled to be heard on the propriety of making that order, he was entitled to be heard on

that point in the motion to remove him as assignee, and by proceeding *ex parte*, the surety company took the risk of being defeated on that motion because of the impropriety of the former order.

This disposes of all the questions raised having any merit, and the order appealed from is affirmed.

ALEXANDER McCUNE v. WILLIS L. EATON and Others.

October 11, 1899.

Nos. 11,854—(149).

Judgment of Dismissal "Upon the Merits."

When plaintiff rested at the close of the testimony on his behalf and before final submission of the case on the trial of the action, it was, on defendant's motion, dismissed. The clerk thereupon entered judgment of dismissal "upon the merits." *Held*, the court erred in refusing, on plaintiff's motion, to strike out the words "upon the merits," and thereby render the judgment one merely of dismissal.

Appeal by plaintiff from an order of the district court for Hennepin county, Elliott, J., denying a motion to modify the form of judgment entered. Reversed.

Alexander McCune and Robert A. Eaton, for appellant.

Pierce & Austin, for respondents.

CANTY, J.

This action was tried by the court and a jury. At the close of plaintiff's evidence, he rested his case, and thereupon, on motion of defendants, the action was, by order of the court, dismissed. The clerk entered judgment adjudging that the action "is hereby dismissed upon the merits." Plaintiff moved to correct the judgment by striking out the words "upon the merits," and appeals from an order denying the motion.

In our opinion, the order appealed from should be reversed. The judgment entered is a bar to the bringing of another action for the cause of action stated in the complaint. This is conceded by both parties, and respondents insist that on the record they are entitled to such a judgment. G. S. 1894, § 5408, provides:

"The action may be dismissed, without a final determination of its merits, in the following cases: * * *

Third. By the court, where, upon the trial, and before the final submission of the case, the plaintiff abandons it, or fails to substantiate or establish his claim, or cause of action, or right to recover."

Section 5409 provides:

"In every case, other than those mentioned in the last section, the judgment shall be rendered on the merits."

The judgment which should have been entered in this action is that prescribed by the former section, not that prescribed by the latter.

The order should be reversed, and the cause remanded, with directions to the court below to correct the judgment in accordance with this opinion. So ordered.

STATE ex rel. KATE LARSON v. DISTRICT COURT OF WATONWAN COUNTY and Others.

October 11, 1899.

No. 11,943.

Appeal from Justice Court—Jurisdiction of District Court—Prohibition.

Petitioner was convicted before a justice of the peace; appealed to the district court on questions of both law and fact; then moved the court to dismiss the proceeding, on the ground that the crime charged is one of which the justice had no jurisdiction; the motion was denied, and the court is proceeding to try defendant de novo for such crime. *Held*, the district court had jurisdiction of the appeal, whether or not the justice of the peace had jurisdiction of the offense, and prohibition will not lie to prevent the district court from proceeding.

Motion for an order that a writ of prohibition issue to the district court of Watonwan county, the Honorable M. J. Severance, judge of said court, and Ashley Coffman, Esq., county attorney of said county, commanding them to desist from all further proceedings in a certain action. Motion denied.

Seager & Lobben, for relator.

Ashley Coffman, for respondent.

CANTY, J.

Relator petitioned this court that a writ of prohibition issue to said district court. The petitioner was charged before a justice of the peace with the crime of assault, pleaded not guilty, was tried by a jury, found guilty, and sentenced to pay a fine, or, on default of payment, to be imprisoned in the county jail. She thereupon appealed to the district court on questions of both law and fact. The return was duly filed, and, on the first day of the next general term of the district court, she moved that court to dismiss the proceeding, on the ground that the justice of the peace never had any jurisdiction of the offense charged in the complaint. The motion was denied, and the district court is proceeding to try petitioner for the offense charged in the complaint. She claims that the offense so charged is not merely assault and battery, but assault in the second degree, of which a justice of the peace would have no jurisdiction, and therefore the district court, on appeal, could not convict her of the offense.

Conceding, without deciding, that the offense so charged is assault in the second degree, it does not follow that a writ of prohibition should issue. That writ will lie only where there is a want of jurisdiction of the subject-matter in the court against which the writ is directed. The district court clearly had jurisdiction of the appeal of petitioner, and did not lose jurisdiction by making an erroneous ruling. Appellant concedes that the district court had jurisdiction to annul the judgment of the justice and dismiss the proceeding, and should have done so. If, as petitioner contends, the court erred in the performance of its duty within its jurisdiction, the remedy must be by appeal or writ of error, and cannot be by prohibition.

Motion denied.

OBED P. LANPHER and Others v. JOSEPH BURNS and Another.

October 19, 1899.

Nos. 11,755—(42).

Assignment for Benefit of Creditors—Laws 1881, c. 148.

To constitute an effective assignment for the benefit of creditors under the insolvent act of 1881, it must affirmatively appear from the face of the instrument that it was executed under the provisions of that act; otherwise, it must be conclusively presumed to be merely a common-law assignment, under the act of 1876.

Common-Law Assignment.

In the case of a mere common-law assignment for the benefit of creditors, void for any cause, creditors may seize the property on legal process the same as if no assignment had been made, and, as a defense to an action brought by the assignee, set up the invalidity of the assignment.

Same—Assignee to be Resident Freeholder.

Under the assignment law of 1876, an assignment for the benefit of creditors is void unless the assignee named therein is a resident and freeholder of this state.

Action in the district court for St. Louis county praying that an assignment for benefit of creditors executed by defendant Burns to defendant Holmes be adjudged void and for other relief. The case was tried before Cant, J., who found in favor of plaintiffs; and from a judgment entered pursuant to the findings, defendant Holmes appealed. Affirmed.

Davis, Hollister & Hicks and Henry J. Grannis, for appellant.

Alford & Hunt, for respondents.

MITCHELL, J.

In November, 1897, the defendant Burns executed to the defendant Holmes an assignment of all his unexempt property for the benefit of his creditors. All the conditions existed in fact which would have authorized Burns to execute a valid assignment for the benefit of his creditors, either at common law as regulated by the assignment act of 1876, or under the insolvent law of 1881. The instrument did not state, and there was nothing in its contents to show, under which act it was executed, except and unless it be the

fact that the trust created by it is not for the benefit of those creditors who shall release the debtor, but for the benefit of all creditors. No releases were required as a condition of sharing its benefits.

In January, 1898, the plaintiffs commenced an action against Burns for the recovery of money, and garnished Holmes, who disclosed that he had in his possession property of Burns, which he held under this assignment. Thereupon, after plaintiffs had obtained judgment against Burns, they commenced this action against him and Holmes to have the assignment adjudged void and set aside, on the ground (which the court finds was the fact) that Holmes was not at the date of the assignment, and never since had been, a freeholder within this state, and to have it further adjudged that the garnishment of Holmes constituted a good and valid lien upon the money and property disclosed by him to be in his hands. The court held that the assignment was void for the reason already stated; that the plaintiffs had, by virtue of their garnishment, a valid lien on the money and property in Holmes' possession; and directed him to pay or turn over to plaintiffs sufficient thereof to satisfy their judgment against Burns. From a judgment entered accordingly, the defendant Holmes appealed.

In our opinion, the whole case turns upon the question whether, on these facts, the instrument is to be held an assignment at common law, as regulated by the act of 1876 (G. S. 1894, § 4227, et seq.), or one under the insolvent law of 1881 (section 4240, et seq.). This is to be determined exclusively from the face of the assignment itself.

The act of 1876 expressly provides that every such assignment shall be void, unless the assignee or assignees therein named are residents and freeholders of this state. Hence, in the case of an assignment at common law under the act of 1876, the disability of the assignee in the respect referred to, or fraud on part of the assignee, will per se render it void. But for reasons growing out of the nature and purpose of the act of 1881, which is a bankrupt act, we have repeatedly held that such facts will not avoid an assignment executed under that act. In *re Mann*, 32 Minn. 60, 19 N. W. 347; *Simon v. Mann*, 33 Minn. 412, 23 N. W. 856. The reasons for

this distinction are fully stated in the cases cited, and hence need not be repeated.

We are of opinion that, to constitute a valid and effective assignment under the act of 1881, it must affirmatively appear from the face of the instrument that it was executed under the provisions of that act. The power to make an assignment for the benefit of creditors existed at common law, and was not dependent on any statute. The act of 1876 merely regulates in certain particulars the exercise of this pre-existing right. But the power to execute an assignment under the act of 1881, which has been repeatedly held to be in all essentials a bankrupt act, is derived exclusively from the statute itself. The scope and purpose as well as the respective rights and remedies of debtor and creditors under a common-law assignment are in many substantial particulars different from one under the act of 1881. In view of this, we deem it essential that creditors and other interested parties shall be advised by the instrument itself whether it is an assignment under the act of 1881, and, if it does not so advise them, it must be conclusively presumed to be merely a common-law assignment. While this court may not have previously expressly so held, yet we think it will be found that all of our decisions bearing upon the subject have proceeded, impliedly at least, upon that assumption. See *Smith v. Bean*, 46 Minn. 138, 48 N. W. 687.

We do not wish to be understood as meaning that it is essential that the assignment should expressly state, in so many words, that it is executed under the law of 1881. That may sufficiently appear from the fact that the assignment contains provisions authorized by the act of 1881 which would be neither authorized nor valid in a common-law assignment, as, for example, creating a trust exclusively for the benefit of creditors who shall file releases of the debtor. *Smith v. Bean*, *supra*. The question whether an assignment which does not provide for such releases can ever be effective under the act of 1881 has several times been mooted, but never passed upon by this court. Some quite forceful reasons in favor of the negative have been urged by Justice Putnam in *Greaves v. Neal*, 57 Fed. 816. But it is unnecessary at this time to pass upon this question.

We therefore hold that the instrument under consideration is

merely a common-law assignment, and as such is void, under the provisions of the act of 1876, because the assignee named therein was not a resident freeholder of this state.

2. It is further urged that the assignment cannot be attacked "collaterally, but only directly, in the assignment proceeding." Without stopping to consider the nature of the attack made upon this assignment, it is sufficient to say that nothing is better settled than that, in the case of a common-law assignment for the benefit of creditors, void for any cause, creditors may attach or levy upon the property assigned precisely as if no assignment had been made, and as a defense to a suit by the assignee set up the invalidity of the assignment. The authorities cited by appellant were cases of assignments under the act of 1881, regular upon their face, where the assignment proceeding is held to be judicial, and the property assigned in custodia legis. See *Second Nat. Bank v. Schranck*, 43 Minn. 38, 44 N. W. 524. The cases are not in point.

Judgment affirmed.

LUMBERMEN'S INSURANCE COMPANY and Others v. CITY OF ST.
PAUL and Others.

October 19, 1899.

Nos. 11,766—(43).

Parties to Action—Lien of Mortgagee upon Fund—Pleading.

In an action by mortgagees to have the liens of their mortgages adjudged to be liens upon the money awarded as damages to the mortgaged premises by an easement in the premises acquired by the public subsequent to the execution of the mortgages, the owners of the fee, to whom the award would belong in the absence of any lien upon it in favor of the mortgagees, are proper, if not necessary, parties to the action. It is not necessary, in such a case, that the complaint should allege that they have already disputed the liens of the mortgagees or asserted a right to the money themselves.

Appeal by certain defendants from an order of the district court for Ramsey county, Brill, J., overruling their demurrer to the complaint. Affirmed.

B. H. Schriber, for appellants.

W. J. Hahn, J. M. Martin and Percy D. Godfrey, for respondents.

MITCHELL, J.

For the purposes of this appeal, all that need be said as to the nature of this action is that it is one by mortgagees against the city of St. Paul and the next of kin and heirs at law of their deceased mortgagor to have the liens of their mortgages adjudged to be liens upon the amount awarded as damages to the mortgaged premises by reason of a right acquired by the city of St. Paul, subsequent to the execution of plaintiffs' mortgages, to construct and maintain a sewer upon and across the premises, and to have the award, which was in gross, apportioned among the different mortgagees, according to their respective rights, and to recover the amounts from the city.

The defendants, other than the city of St. Paul, demurred to the complaint on the ground that it did not, as to them, state facts constituting a cause of action. The sole point urged in the briefs in support of the demurrer is that the appellants were neither necessary nor proper parties to the action. The parties interested in this award are the owners of the fee of the land and the lienholders, if any. If there were no lienholders, or if the amounts due them on their liens were less than the award, then the award or the excess belongs to the defendants, as heirs at law of the deceased mortgagor. Among the facts to be determined in the action are—First, whether a lien on the award exists in favor of the plaintiffs; and, if so, second, the amount of it. The defendants, as heirs at law of the mortgagor, are vitally interested in the determination of these questions. Unless they are made parties to the action, any judgment that might be rendered in it would be as to them wholly *res acta inter alios*, and leave them at liberty to assert against either the city or the plaintiffs their rights to the proceeds of the award precisely as if no judgment had ever been rendered.

In actions in equity, so-called "necessary parties" are those without whom no decree can be effectively made. "Proper" parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may

be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject-matter of the litigation. *Pomeroy, Rem. & Rem. Rights*, § 329. Under this rule, the defendants, if not necessary parties, were, at least, proper parties, to the action. The principal contention of the appellants, briefly stated, seems to be that the complaint is defective, in that it does not allege that the defendants have as yet disputed plaintiffs' right to this money or asserted any right to it themselves. We are not aware of, and have not been referred to, any authority holding that any such allegation is necessary in such a case. It is sufficient to render the appellants proper parties that it appears from the facts alleged that they may hereafter make such a claim, and would do so successfully, unless concluded by the judgment in this action, or the plaintiffs establish their right as a fact in any future litigation over the same subject-matter.

The order overruling the demurrer is hereby affirmed.

PRESTON C. RICHARDSON v. CARRIE COLBURN.

October 19, 1899.

Nos. 11,784—(132).

Gift—Delivery—Charge to Jury.

In an action by the administrator of the estate of a deceased husband against the widow to recover possession of certain personal property, in which the widow interposed the defense that her husband had in his lifetime made her a gift of the property, the sole issue litigated on the trial was as to whether there had been a delivery of the property to the wife by the husband in his lifetime, such as would constitute a valid, executed gift. The widow testified to a state of facts which, if true, constituted a valid, actual, manual delivery. Upon the trial counsel for the defendant expressly disclaimed any other delivery than the one thus testified to by her. Thereupon the court, without objection by either party, instructed the jury that as a matter of law the facts testified to by the defendant would constitute a sufficient delivery, and that, if they found the facts to be as testified to by her, their verdict should be for the defendant, otherwise it should be for the plaintiff; thus narrowing the issue to the single question of the truthfulness of the defendant's testi-

mony as to a delivery. *Held*, that this instruction fully covered the whole case, as thus limited, and that there was no error in refusing to give other instructions as to what would or would not constitute a valid delivery.

Action in the district court for Hennepin county by plaintiff as administrator of the estate of Chester J. Colburn, deceased, to recover possession of certain certificates of stock, or judgment for \$7,000, the value thereof. The case was tried before McGee, J., and a jury, which found in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. *Affirmed*.

Roberts & Sweet, for appellant.

John H. Steele, for respondent.

MITCHELL, J.

This action was brought to recover possession of certain certificates of stock in a savings and loan association which plaintiff alleges belong to the estate of his intestate. The defendant, who is the widow of the intestate, claims that her husband, in his lifetime, made her a gift of the stock. The evidence was undisputed that in his lifetime the husband executed upon the back of the certificates written assignments of the stock to his wife. There was practically no conflict in the evidence as to his intention to make a gift of the stock to his wife. Hence the only issue on the trial (and the court expressly so instructed the jury) was whether there had been a delivery of the stock certificates to the defendant by her husband in his lifetime, so as to constitute a valid, executed gift.

The defendant testified that her husband on a certain occasion took the certificates from a drawer in which he had kept them, wrote and signed the indorsed assignments to her, and then handed her the certificates, accompanied by a declaration of an intention thereby to make her a gift of the stock; that she thereupon took the certificates and put them in a bureau drawer in her room, upstairs, where she kept other papers of a similar character belonging to her; and that they remained there until after her husband's death. The evidence introduced by the plaintiff consisted of testimony tending to impeach this statement of the defendant, to wit, inconsistent statements alleged to have been previously made by her before the

probate court in the proceedings for the appointment of an administrator of her husband's estate.

As already suggested, it was conceded that the husband had indorsed upon the certificates assignments of the stock to his wife. Hence the case was tried throughout upon the theory that a delivery was necessary to constitute a valid gift, and, by necessary implication, that the execution of the written assignments would not, in and of itself, constitute a delivery. When the court came to charge the jury, he inquired of defendant's counsel if it was claimed that there was any other delivery than the one testified to by her; to which her counsel replied, "No;" thus disclaiming any other delivery, and consenting to stand exclusively upon the one testified to by the defendant. Thereupon the court instructed the jury that, as a matter of law, if they found the facts to be as testified to by the defendant, they constituted a sufficient delivery, and their verdict should be for the defendant, but, on the other hand, if the intestate did not at that time deliver the certificates to the defendant, as testified to by her, then their verdict should be for the plaintiff. This narrowed (and properly so) the whole case down to the single question of the truthfulness of the defendant's testimony as to the delivery, and the instruction given in this concrete form fully covered the case as thus narrowed. Any instructions as to the law of delivery, or what would constitute a sufficient delivery, would, under the circumstances, have been wholly unnecessary, and would have rather tended to confuse or mislead the jury. The verdict was for the defendant, and no claim is made that the evidence did not justify it.

The burden of plaintiff's assignments of error is that the court did not fully instruct the jury upon the law as to what would or would not be a sufficient delivery to constitute a valid gift *inter vivos*, in that the court refused to instruct the jury:

(1) "That it was necessary, in order to make a valid delivery, that the defendant prove, by other evidence than the indorsements on the back of the certificates and the present possession of the property, a manual and physical delivery of the property to her."

(2) "That in order to find a verdict for the defendant, it will be necessary for you to find, not only that the defendant knew of the

assignment of the stock to her, but also that the deceased had actually delivered the certificates of stock to her before his death; that is, that the deceased had put the certificates out of his control, and into the exclusive control of the defendant."

Assuming, without deciding, that these requests were good law, we are clearly of opinion that, in view of the theory upon which the case was tried throughout, and the fact that under the disclaimer of counsel, and the subsequent action of the court, narrowing the issues in the case to the single question whether there was an actual, manual delivery of the certificates at the time and in the manner testified to by the defendant, and the express instruction to the jury that their verdict should depend upon how they found that fact to be, the jury could not have misunderstood the charge as given, which fully covered the whole case as submitted to them, and therefore there was no prejudicial error in refusing to give the further instructions asked for. The exception to the charge which is the basis of the first assignment of error was too general and indefinite to be available to the appellant.

Order affirmed.

An application for a reargument having been made, the following opinion was filed November 13, 1899:

MITCHELL, J.

Part of the stock certificates in dispute were claimed by the defendant to have been given to her in January and a part in March, 1898. As to those alleged to have been given in March, the evidence was undisputed that the deceased, with the intention and for the purpose of making a gift of the stock to the defendant, indorsed upon the certificates assignments to her, took them to the office of the corporation, and surrendered them, and that at his request the corporation issued, in lieu of them, new certificates running to the defendant, gave them to the deceased, and made a transfer of the stock to the defendant on its stock books. As to those claimed by defendant to have been given to her in January, the evidence of delivery was as stated in the original opinion.

Upon an application for a reargument plaintiff calls our attention to the fact that the instructions of the court quoted in the opinion

were given solely with reference to the stock claimed to have been transferred in March. A re-examination of the charge discloses that this is the fact. But this will not change the result. As stated in the original opinion, it was not disputed that the deceased executed upon the back of the certificates claimed to have been delivered to the defendant in January assignments to her, leaving the only issue as to these certificates the question of delivery. The facts testified to by the defendant constituted, as a matter of law, a good delivery. No other delivery, either actual or constructive, was claimed or suggested on the trial. The only difference in that regard between the stock certificates claimed to have been delivered in January and those in March was that in the former there was no express disclaimer of any other delivery than the one testified to by the defendant. Hence the whole case came down to the question of defendant's veracity. The fact of the deceased's indorsement of assignments of the certificates to the defendant with the intention of making a gift of them to the defendant being conceded, the case was tried throughout and submitted to the jury on the theory that this was not of itself sufficient to constitute a delivery, but that, in addition to the assignments, there must have been a surrender of the dominion and control over them to the defendant. The jury could not have otherwise understood the charge of the court, for, on the conceded facts, there was no other question for them to decide. This understanding was further impressed upon them by the remark of the judge, when requested to give the first instruction referred to in the opinion, which was:

"The court has not charged the jury that the assignment on the back of the certificates and the present possession are sufficient to entitle the defendant to recover on the issue of delivery."

Therefore, although the request was, in form, refused, there was no prejudicial error. The same thing is true, and for substantially the same reasons, in regard to the refusal to give the plaintiff's second request.

Application for reargument denied.

DANIEL W. HARDING v. GREAT NORTHERN RAILWAY COMPANY.

October 19, 1899.

Nos. 11,791—(34).

Personal Injury—Verdict Sustained by Evidence.

In an action to recover damages for personal injuries, *held*, that the evidence justified the amount of the verdict in favor of the plaintiff.

Cross-Examination of Plaintiff—Drunkenness.

Also that, upon the facts of the case, there was no prejudicial error in excluding the following question propounded to the plaintiff on cross-examination, for the purpose of affecting his credibility as a witness: "During that time [previously specified] were you convicted of the crime of drunkenness, and for a time confined in the jail in St. Cloud on account of intoxication?"

Action in the district court for Ramsey county to recover \$20,000 for personal injuries. The case was tried before O. B. Lewis, J., and a jury, which rendered a verdict in favor of plaintiff for \$2,000; and from an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. Affirmed.

C. Wellington, for appellant.

Clarke & Jaques, for respondent.

MITCHELL, J.

This action was brought to recover damages for personal injuries caused by the alleged negligence of defendant. The trial resulted in a verdict in favor of the plaintiff for \$2,000. The defendant admits that there was evidence reasonably tending to prove the negligence of the defendant, and hence that the verdict of the jury is conclusive upon that issue. Neither do we understand that the defendant disputes the fact that this negligence caused some injury to the plaintiff, and hence that he is entitled to recover some amount. Its contention is that some of the injuries which plaintiff claims to have sustained were never sustained at all, and that some, and perhaps the most serious, of the ailments with which he is actually suffering, were not caused by the negligence of the defendant, but were the result of other causes, such as previous bodily in-

juries or previous constitutional disease, and that, in view of these facts, the damages awarded are excessive.

Aside from the testimony of the plaintiff and his wife, the evidence consisted mainly of the testimony of medical experts who had attended upon or examined him professionally. As usual, the testimony of these medical witnesses differed radically, both as to what injuries plaintiff had received and from what ailments he was suffering, and also as to the cause of them. If the evidence for the plaintiff is true, the verdict was not excessive; while, if that for the defendant is true, it probably was. As to most, if not all, of the material matters upon which there was a conflict, the evidence was not such that a court could, as a matter of law, hold that it required a verdict for or against either party. We are not entirely satisfied with the verdict. Judging from the cold record, there are facts in evidence which tend to give an impression that, as is very common in such cases, the plaintiff somewhat exaggerated his injuries and ailments, and may also have attributed to the accident referred to in his complaint injuries and ailments that were chargeable to other causes. But, under the evidence, these were all questions for the jury who saw and heard the witnesses testify; and, their verdict having been approved by the judge who presided at the trial, we do not think that we would be justified in disturbing it on the ground that it was excessive. This being the conclusion at which we have arrived after an examination of the whole record, it is unnecessary, as well as useless, to discuss or analyze the evidence.

2. One of the claims made by the defendant on the trial was that some of the ailments under which the plaintiff was, or claimed to be, suffering were caused by the excessive use of intoxicating liquors, and some evidence had been introduced tending to prove that plaintiff had used such liquors to the extent of becoming intoxicated. On the cross-examination of the plaintiff by defendant the following occurred:

"Q. Prior to January 8, 1897, had you taken what is termed the 'Keeley Cure'? A. I had; yes, sir. Q. How many years before January 8, 1897, had you attended a Keeley institute? A. I think I got there on August 10, 1893. * * * Q. And you lived there

[in St. Cloud] through June, 1898? A. Yes, sir. * * * Q. Now, at the time that you were living there, in this year, were you intoxicated? A. I was. Q. During that time were you convicted of the crime of drunkenness, and for a time confined in the jail in St. Cloud on account of intoxication? (Objected to as incompetent, irrelevant, and immaterial.) The Court: How is that material, Mr. Wellington? Mr. Wellington: Material to show that his intoxication arose to such an extent that he was confined in jail; that it wasn't the mere light use of intoxicating liquors, but an excessive use; and as affecting his credibility. (Objection sustained. Exception by defendant.) The Court: If you want to show he was intoxicated, you can show that. Q. How many times were you intoxicated between December, 1897, and up to the time you left St. Cloud? A. From what date? Q. From December, 1897, up to the time you left St. Cloud. A. I can't call over four times that I was under the influence of liquor. Q. Did you use it habitually, along from day to day? A. No, sir."

The exclusion of the question as to whether the plaintiff had been convicted of drunkenness and confined in jail for intoxication is assigned as error. Upon the first ground upon which counsel claimed that the evidence was material, viz., the extent to which the plaintiff used intoxicating liquors as bearing upon the cause of his ailments, the ruling of the court was unquestionably right.

If there was any error, it must be because the evidence of conviction was competent under G. S. 1894, § 5658, as affecting the credibility of the witness. In *State v. Sauer*, 42 Minn. 258, 44 N. W. 115, we held that this section applied to all crimes, whether felonies or misdemeanors, and whether the crime was or was not one the conviction of which would at common law have rendered a person infamous, and hence incompetent to testify as a witness. This doctrine is probably in conflict with the decisions in some other jurisdictions having the same or a similar statutory provision. But we are not disposed to recede from the rule of *State v. Sauer*. It does no substantial injustice to the witness, and it avoids all the difficulties which so much troubled the courts under the common law in determining what were crimes the conviction of which would render the party incompetent as a witness. And there is no doubt that, under our statutes, drunkenness is a crime. G. S. 1894, § 6949.

The main reasons why the proof of guilt of a crime is limited to

the record of conviction are that it would be unfair to the witness to prove his guilt in any other way, and also because, in the multiplication of collateral issues, the principal case would be liable to be lost sight of. 1 Greenleaf, Ev. § 372. But, as there is no danger in accepting the witness' own admission on the stand, the propriety of proving the conviction by cross-examination is now conceded in most jurisdictions. But it is the crime, and not the punishment attached to it, which rendered a party infamous and incompetent as a witness at common law, and which affects his credibility as a witness under our statute. *Pendock v. Mackinder*, Willes, 665; *Rex v. Ford*, 2 Salk. 690. Hence I am of opinion that, while the fact of conviction was material and competent as affecting the credibility of the witness, the punishment inflicted was neither material nor competent, and that, inasmuch as part of the question was immaterial and incompetent, there was no error in excluding the entire question. But the majority of the court prefer to sustain the ruling of the court upon the ground that, inasmuch as the witness had expressly and fully admitted that he had been more than once guilty of the crime of drunkenness, the defendant had already received all the substantial benefit which it would have received from proof of conviction; and that as applied to a mere misdemeanor, like drunkenness, which is not a heinous crime, and does not render a person infamous, or necessarily or naturally imply that he is morally corrupt, the error of the court, if any, was without substantial prejudice to the defendant.

3. There is no merit in the third assignment of error. There was nothing in the answer of the witness prejudicial to the defendant. The advice of Dr. Gilman to the plaintiff, and the conversation between plaintiff and Bauman, were not given, and neither of them was made the basis of any attack upon the report which the plaintiff made to the defendant in relation to the accident in which he was injured.

Order denying a new trial affirmed.

HENRY LIDGERDING v. JOHN ZIGNEGO.

October 19, 1899.

Nos. 11,808—(122).

Right of Way over Land—Deed—Words of Inheritance.

S. and Y. owned and occupied adjoining farms. A public highway ran through the farm of S., to which Y. had no access from his own land. S. executed a deed, by which he bargained, sold, and released to Y. the right of way across his farm, "to cross on foot or with team," "which right hereby conveyed shall be understood to be" "the right to cross said land as aforesaid upon or near" the line between [two described 40's, according to government survey, constituting a part of plaintiff's farm]. This deed, which was executed in 1866, contained no words of inheritance. The right of way thus granted gave Y. access from his own land to the highway referred to, and has ever since been used exclusively for that purpose by Y., and the defendant, his grantee. So far as appears, the right of way was useless for any other purpose. In 1898 plaintiff, the grantee of S., placed obstructions across the driveway to prevent defendant from using it, which defendant removed. In an action for this alleged trespass, *held*, that the deed was sufficiently definite as to the land to be used as a right of way.

Same—Easement.

That it granted, not a mere revocable license, but an easement in the land of the grantor.

Same—Appurtenant to Land.

That this is an easement, not in gross or personal to Y., but appurtenant to the land then owned and occupied by him; and this is so whether the grant was in fee simple, or, by reason of the absence of words of inheritance, only for life.

Easement in Gross.

An easement in gross will never be presumed when it can be fairly construed to be appurtenant to some other estate. A right of way is appurtenant to the land of the grantee if so in fact, although not declared to be so in the deed. Whether such an easement is in gross or appurtenant to some other estate may be determined by the relation of the easement to such estate, and in the light of all the circumstances under which it was granted. The facts that such an easement was intended for the benefit of the grantee's land, and to be used in connection with its occupancy, and has been so used, and is useless for any other purpose, will

overcome any presumption that it was intended to be in gross that might otherwise arise from the absence of the words "heirs and assigns."

Action in the district court for Goodhue county to recover \$125 for trespass on land. The case was tried before Williston, J., and a jury, which rendered a verdict in favor of defendant; and from an order denying a motion for a new trial, plaintiff appealed. Affirmed.

J. C. McClure, for appellant.

An easement implies an interest in the land over which it is enjoyed; a license carries no such interest. Washburn, Easem. (4th Ed.) 6-30; Cahoon v. Bayaud, 123 N. Y. 298; Johnson v. Skillman, 29 Minn. 95. The instrument in controversy did not convey an easement. By its terms the use of the right of way was given to Youngers alone. Even if the right would pass to his heirs, it was not such a right as he could convey. The instrument conferred a mere license to him personally which was not assignable. Mendenhall v. Klinck, 51 N. Y. 246; Hazelton v. Putnam, 3 Pinn. 107; Washburn, Easem. (4th Ed.) 6. A reservation or exception in a deed for benefit of a stranger or one not a party is void. Bridger v. Pierson, 45 N. Y. 601; Walrath v. Redfield, 18 N. Y. 457; Hornbeck v. Westbrook, 9 Johns. 73. A fortiori this rule holds as to one not named. A subsequent conveyance or lease of land operates as a revocation of a license to use it. Kamphouse v. Gaffner, 73 Ill. 453; Johnson v. Skillman, supra; Kremer v. Chicago, M. & St. P. Ry. Co., 51 Minn. 15, 19; Williams v. Morrison, 32 Fed. 177. The writings on which defendant rests his claim do not sufficiently define the portion of land to be used, and are void for indefiniteness. Johnson v. Skillman, supra; Watson v. Chicago, M. & St. P. Ry. Co., 46 Minn. 321; State v. Welpton, 34 Iowa, 144; Plimpton v. Converse, 44 Vt. 158, 165; Washburn, Easem. (4th Ed.) 151.

Albert Johnson, for respondent.

MITCHELL, J.

This was an action to recover damages for an alleged trespass upon real property.

The material facts are as follows: In 1866 one Schlichthaber

owned and occupied a farm, and one Youngers owned and occupied another farm adjoining on the east. Near the east line of Schlicthaber's farm, but 15 rods west of it, there ran through his land a north and south highway, known as the "Red Wing and Zumbrota road," to which Youngers had no access from his own farm. In this condition of things, in December, 1866, Schlicthaber executed to Youngers a deed of right of way across the land of the former, the terms and conditions of which were that, for the expressed consideration of one dollar, S. "bargained, sold, released, and conveyed to Y.

"The right of way to cross on foot or with team the land [of the former—describing it]; which right hereby conveyed shall be understood to be, and is hereby declared to be, the right to cross said land as aforesaid upon or near the line between the northwest $\frac{1}{4}$ and the southwest $\frac{1}{4}$ of said northeast $\frac{1}{4}$ of section 5, as near as practicable."

This instrument was duly recorded. Subsequently, by certain mesne conveyances, the plaintiff became the owner of the Schlicthaber farm, and the defendant became the owner of the Youngers farm; the deed from the latter to the defendant containing, in addition to a conveyance of the land, the following:

"And the said grantors hereby grant, bargain, sell, and convey unto the said grantee, his heirs and assigns, all and singular the rights, privileges, and easements conveyed to the said William Youngers by Frederick Schlicthaber and wife by written instrument [describing the instrument already referred to]."

The record seems to be somewhat elliptical, but from what the evidence discloses, and from what is asserted by the trial court and defendant's counsel, and not disputed by plaintiff's counsel, we assume that soon after the grant of right of way by Schlicthaber to Youngers, in 1866, a driveway just wide enough for a wagon to pass along it was established across the land of S., and upon or near the line referred to in the deed from S. to Y., and extending from the line between the two farms west to the Red Wing and Zumbrota road, and that this driveway has been used by Y., and the defendant, his grantee, up to 1898, as a means of ingress and egress to and from their farm to this highway. In 1898 the plain-

tiff placed a fence and other obstructions across this driveway, in order to prevent the defendant from using it. The defendant removed the obstructions, and continued to use the driveway as before. This constitutes the alleged trespass complained of. The trial court directed a verdict for the defendant, and from an order denying plaintiff's motion for a new trial the latter appealed. The case, in our judgment, depends entirely upon the construction and effect to be given to the deed of right of way from Schlichthaber to Youngers.

1. It is urged that the provisions of this instrument are so indefinite and uncertain as to the land to be used as a right of way as to render it wholly void. We discover no such indefiniteness in the instrument. It states the purposes for which the right may be used, to wit, to cross the land on foot or with team, and this necessarily implies the right to use a strip of land of the width reasonably necessary to the enjoyment of the uses for which the grant was made. It defines the line upon or near which the right of way shall be located. The driveway appears to be located on that line, and there is no claim that more land has been used than is necessary. The language of the instrument is perhaps broad enough to give the grantee a right of way entirely across plaintiff's farm, but the practical construction apparently given to it by both parties has been to limit this right to the distance necessary to give the grantee access from his land to the highway, which was doubtless the object of the grant.

2. It is further contended that the provisions of the instrument amounted merely to a revocable license personal to Youngers alone, and hence not assignable, and which was in fact revoked by Schlichthaber's alienation of the land. This contention is based upon the fact that the instrument does not contain the words "heirs and assigns."

It is very clear, under all the authorities, that the right of way granted constituted an "easement." We do not deem it necessary to discuss the question. We are also of opinion that it was not an easement in gross,—that is, personal to Youngers,—but an easement appurtenant to the land then owned and occupied by Youngers as a farm. Though an easement, such as a right of way, may

be created by a grant in gross, this is never to be presumed, when it can be fairly construed to be appurtenant to some other estate. Washburn, Easem. 45. An easement is appurtenant, and not in gross, when it appears that it was granted for the benefit of the grantee's land. A right of way is appurtenant to the land of the grantee if so in fact, although not declared to be so in the deed. If the way leads to the grantee's land, and is useless except for use in connection with it, and after the grant was used solely for access to such land, it is appurtenant to it. Jones, Easem. § 19. Whether a grant of an easement is in gross or appurtenant to some other estate may be determined by the relation of the easement to such estate, or the absence of it, and in the light of all the circumstances under which the grant was made. Id. § 34; Hopper v. Barnes, 113 Cal. 636, 45 Pac. 874; Dennis v. Wilson, 107 Mass. 591.

We have here two adjacent landowners, S. and Y. A highway runs across the land of S., to which Y. has no access from his own land. The right of way granted by S. to Y. gives the latter access from his own land to this highway, and it is afterwards used for that purpose. This right of way is, so far as appears, absolutely useless for any other purpose. We therefore hold that the right of way granted was not in gross, but appurtenant to the land then owned and occupied by the grantee, Youngers. In view of the facts, this is so whether the grant to Youngers was in fee simple, or, in view of the absence of words of inheritance, only for life,—a question not in this case. Dennis v. Wilson, supra. The limitation of a right, in express terms, to the life of the grantee, may afford some ground of inference that it was intended to be personal or in gross; but that ground of inference would be overcome if the nature of the right and its apparent use were such as to indicate that it related wholly to the convenience or occupation of real estate. But, as said in Dennis v. Wilson, supra, when the limitation results from omitting words of inheritance, the inference in that direction, if any can be drawn therefrom, must be very slight. Defendant, having a right of way over plaintiff's land, could lawfully use all peaceable means reasonably necessary to remove the obstructions, so as to enable him to exercise his right.

3. Plaintiff testified that

"When the defendant tore the fence down he broke the boards and entirely destroyed them. The materials used in building the fence, and the labor in putting it up, would be, at least, of the value of two dollars."

It is claimed by the plaintiff that he was entitled to a verdict for at least two dollars. This was, at best, a mere trifling side issue, and does not appear to have been urged or brought to the attention of the court on the motion to direct a verdict. It will be observed that there was no evidence of the value of the boards exclusive of the labor in constructing the fence, or that it was unnecessary to break and destroy the boards for the purpose of removing the fence. In view of the purpose for which the plaintiff built the fence, it is not improbable that the boards were so securely fastened that, in order to remove them, it was necessary to break them, so as to destroy their value as lumber.

Order affirmed.

MICHAEL SHEEHAN v. ALICK NEWPICK.

October 19, 1899.

Nos. 11,870—(181).

Judgment against Garnishee for Less than Ten Dollars.

In an action in justice's court, the garnishee disclosed that he was indebted to the defendant in \$34.87 for labor performed within 30 days of the commencement of the action. The defendant appeared, and claimed his statutory exemption of \$25. The justice allowed the exemption, and rendered judgment against the garnishee for the balance of \$9.87. *Held* error; that, under the provisions of G. S. 1894, § 5338, judgment cannot be rendered against a garnishee for less than \$10. The object of the statute being to prevent the debtor's money or property from being used up in costs, to his detriment and without benefit to his creditor, the sums therein named must be construed as referring to the amount subject to garnishment, for which judgment may be rendered against the garnishee.

Action in justice court against Alick Newpick, as defendant, and H. H. Smith, as garnishee. From a judgment against the gar-

nishee for \$9.87, he appealed to the district court for Hennepin county. In the district court the appeal was heard before Harrison, J., who made an order reversing the judgment; and from a judgment entered pursuant to the order, plaintiff appealed. Affirmed.

Frank H. Castner, for appellant.

Bond & Sardeson, for respondent.

MITCHELL, J.

This is an appeal by the garnishee, Smith, from a judgment rendered against him in justice's court for \$9.87. Upon his examination he disclosed that he was indebted to the defendant in the sum of \$34.87 for labor and services performed by him within 30 days of the commencement of the action. The defendant appeared, and claimed an exemption of \$25, under the provisions of G. S. 1894, § 5314. The justice allowed the exemption, and rendered judgment against the garnishee for the balance of \$9.87. The only question is whether, upon these facts, the justice could render judgment against the garnishee for a sum less than \$10.

Section 5306 requires the plaintiff to file an affidavit in garnishment stating that he believes that the value of the property, money, or effects belonging to the defendant in the hands or under the control of the proposed garnishee, or the amount of his indebtedness to the defendant, if the action is in the district court, exceeds the sum of \$25, or, if the action is in justice's court, \$10. Section 5338 provides that no judgment shall be rendered against a garnishee in justice's court where the judgment against the defendant is less than \$10, exclusive of costs, nor where the indebtedness of the garnishee, or the value of the property, money, or effects of the defendant in the hands or under the control of the garnishee, as proved, is less than \$10, the corresponding limit in an action in the district court being \$25. Doubtless the reason for these provisions is that ordinarily, where the amount in the hands of the garnishee is less than the sums named, it would be all used up in costs, to the prejudice of the debtor, and without benefit to the creditor, and the object of the statute is to prevent this useless sacrifice of the debtor's money or property.

The facts do not bring this case within the strict letter of the statute, because the total indebtedness of the garnishee to the defendant as proved was more than \$10. But the facts are fully within its spirit and reason. To hold otherwise would permit the very evils and abuses which the statute was designed to prevent. Take, for example, the case of a laborer employed at monthly wages slightly in excess of \$25; a persistent creditor might follow him up with monthly garnishee proceedings against his employer, and each month obtain a judgment for the small excess, which would be all eaten up in costs. This process might go on indefinitely, to the impoverishment of the debtor and without reducing his debt one cent. We are of opinion that the statute should be construed as meaning that, to entitle the plaintiff to judgment against the garnishee, the amount subject to garnishment, for which judgment may be rendered, must exceed \$10 or \$25, as the case may be.

The judgment of the district court reversing the judgment of the justice is therefore affirmed.

JOANNIN-HANSEN COMPANY v. W. A. BARNES & COMPANY.

October 23, 1899.

Nos. 11,653—(8).

Fire Insurance Brokers—Allegations of Complaint and Facts Found.

Complaint construed, and *held*, that the cause of action established by the trial court's findings, which was the basis of its judgment, is not the cause of action alleged in the complaint.

Appeal by defendant from a judgment of the district court for Hennepin county entered pursuant to the findings and order of McGee, J. Reversed.

Hahn, Belden & Hawley, for appellant.

Lee Combs, for respondent.

START, C. J.

This cause was tried by the court without a jury. Findings of fact were made to the effect following: The defendant, on August

13, 1894, as an insurance agent and broker, agreed with the plaintiff to write or cause to be written for it a policy of fire insurance of \$1,000 on the property described in the complaint, or, in case of its failure or inability so to do, promptly to give the plaintiff notice thereof. The defendant negligently failed to write or cause to be written such policy, and negligently failed to give the plaintiff notice that it had not done so, whereby the plaintiff sustained damages in the sum of \$751.65. As a conclusion of law the court ordered judgment in favor of the plaintiff for the amount of its damages. From the judgment so entered the defendant appealed.

Briefly stated, the contention here of the defendant is that the contract which the trial court found that the parties made, and the neglect of the defendant to discharge the duty on its part growing out of the contract, are not alleged in the complaint; or, in other words, that the facts found by the court, and the supposed cause of action upon which the defendant was held liable, are not alleged in the complaint. No claim is made by the plaintiff that the defendant consented to litigate the issues upon which alone the court found and based its judgment. The real question in this case is whether the ultimate facts found by the court, and upon which its decision was based, are fairly alleged in the complaint. If they are, then the record presents the further question whether the findings are supported by the evidence, but, if they are not embraced in the statement of the cause of action alleged in the complaint, the judgment cannot be sustained, and it is immaterial whether the findings as made are sustained by the evidence or not.

The here material allegations of the complaint are: That the defendant was a corporation and an insurance broker at the city of Minneapolis, whose business was to place insurance upon property in companies of which it was or might be the agent, and to issue policies to the applicant therefor. That the plaintiff had insurance on certain property to an amount exceeding \$20,000, of which \$7,000 was written by the defendant in several companies of which it was the agent. That there was then a custom in the city of Minneapolis among insurance brokers and insurance companies and their agents, with reference to the insurance of property against fire, that whenever a party who theretofore had in-

insurance placed on his property by such broker or agent should desire additional insurance thereon such party would call on the broker, and verbally request him to write the desired amount of such additional insurance on such property; and, no particular insurance company having been designated by the assured, the broker would then, if he agreed to place the risk, write a policy to the amount desired in any responsible insurance company that he might select and designate, for the same period, upon the same terms and rate of premium as then contained in such prior policies. That such additional risk would begin and the policy thereof would date from noon of the day of the application. That, in accordance with such custom, the plaintiff made an application to the defendant at its office in such city, and requested the defendant to write the amount of \$1,000 insurance, and place the same on the property, in addition to the amount theretofore existing thereon, in some insurance company then represented by it as its agent, on the same conditions and at the same premium as contained in the policies of the other companies written on the property by the defendant, as their agent. That the defendant accepted the application for such additional insurance upon such terms, and agreed with the plaintiff to write the sum of \$1,000 on the plaintiff's property, and to issue a policy therefor in a reliable insurance company, to be selected by it, to date and take effect from noon of August 14, 1894; but the defendant wholly neglected and failed to write the amount of \$1,000 additional insurance, or any part thereof, on the property, and failed and neglected to exercise due diligence so to do. That by such failure and neglect of defendant, and on account of the fire hereinafter mentioned, the plaintiff was greatly damaged, and wholly lost the benefit of said additional insurance. That the property was destroyed by fire on August 18, 1894, and thereafter the defendant and all other brokers representing companies having risks on the property, together with the plaintiff, in accordance with the terms of the policies, selected appraisers, who determined the aggregate loss at a sum exceeding \$20,000. That, by the terms of the policies, any insurance contracted for, as in the case of the \$1,000 additional insurance, was to be treated by all of the companies having risks on the property so insured as

though the same had been fully written by some company as additional insurance. That the loss of the plaintiff by reason of the premises was \$871.66.

It is clear from these allegations of the complaint that the cause of action alleged in the complaint is a breach of the defendant's acceptance of the plaintiff's application for insurance and its agreement to write such insurance on behalf of an undisclosed principal; that is, one of the companies represented by it. It is impossible, by any fair construction of the complaint, however liberal, to construe it as embracing the cause of action found by the trial court. The liability of the defendant, as established by the findings of fact by the court, is that the defendant was the broker or agent of the plaintiff, acting for it, and as such agreed to write or procure for it the additional insurance in question, or, in case of its failure so to do, to notify it thereof; and that it neglected to discharge its duty arising from such employment and agency. The allegations in the complaint to the effect that the defendant wholly neglected to write the insurance, or any part thereof, and failed and neglected to exercise due diligence so to do, which is relied on by the plaintiff, is, in legal effect, simply an allegation that the defendant neglected to perform its contract, and neglected to use due diligence so to do. This allegation must be read and construed in connection with the other allegations of the complaint, which are to the effect that the defendant accepted the application for insurance, and absolutely agreed to write it, and issue a policy for one of the companies it represented. The plaintiff could only recover, if at all, on the issues tendered by the complaint.

Upon the construction which we have given to the complaint, it follows that the cause of action established by the court's findings, which was the basis of its judgment, is not the cause of action alleged in the complaint, and that the judgment must be reversed, and a new trial granted. It is so ordered.

MITCHELL, J. (dissenting).

The manner in which the case was tried in the court below and in which it was argued in this court is liable, unless the record is carefully analyzed, to lead to a decision of this appeal upon points

which are either immaterial or not in the case. It is unnecessary to label the action with any particular name, or to determine the exact relation to each other of the parties to the alleged contract. It is sufficient to say that the complaint alleges a contract which, if made, was a valid one, to wit, that defendant would write and place for plaintiff on its mill \$1,000 insurance against fire in one of the companies represented by the defendant as its agent. There is no question of variance between the allegations and the proof. The evidence was such as to justify the court in finding that a complete and definite contract was entered into between the parties; and, if any such contract was entered into, the evidence is conclusive that the insurance was to be written and placed in some company which the defendant represented as agent, or, at least, that such companies were included within the terms of the contract. The evidence is also conclusive that the defendant did not perform its contract, for there is no claim that it ever placed, or attempted to place, the insurance in any company represented by it, or in any other company, or that it was unable to do so, or ever notified the plaintiff that it had not done so or was unable to do so.

The finding of the court fully covers the issue made by the pleadings and the proof. The only criticism to which the finding is subject is that it is broader than the issue tendered by the complaint, so as to include within the terms of the contract insurance companies other than those represented by the defendant as agent. Up to a certain point, the contract alleged and the contract found are coincident. The only difference between the two is that the latter contains the additional provision that, in case defendant should be unable to place the insurance in a company represented by it, it should place it in some other company. But under the state of the evidence this is wholly immaterial. As already suggested, if the court found—as it has, and was justified in doing—that there was a completed valid contract between the parties, the evidence required a finding that the defendant had failed to perform the contract as alleged, and consequently a conclusion of law that plaintiff was entitled to recover wholly irrespective of the additional

provision which the court's finding incorporated into the contract. I therefore think the judgment appealed from should be affirmed.

CANTY, J.

I concur with Justice MITCHELL.

STATE v. DULUTH & IRON RANGE RAILROAD COMPANY.

October 23, 1899.

Nos. 11,720—(17).

Railway—Gross-Earnings Tax—Constitution—State v. Stearns Followed.

Sp. Laws 1873, c. 111, providing that railroads accepting that act should pay a gross-earnings tax in lieu of all other taxation on their property, is unconstitutional, so far as it is repugnant to the constitutional amendment of 1871 (section 32a, art. 4); and, as that amendment reserves the right to amend or repeal all such gross-earnings laws, the railroads, in accepting said chapter 111, did not acquire any contract right that such method of taxation should never be changed. *State v. Stearns*, 72 Minn. 200, followed.

Land Grant of D. & I. R. Railway—Exemption from Taxation.

The provision in Sp. Laws 1875, c. 54, exempting from taxation for five years the lands granted to the Duluth & Iron Range Railroad Company to aid in the construction of its road, is also unconstitutional, so far as it is repugnant to said constitutional amendment of 1871; and after Laws 1895, c. 168, took effect, the lands were taxable from and after the time the patent issued.

In proceedings to enforce payment of delinquent real estate taxes for 1897, defendant interposed an answer. The case was tried before Moer, J., who found in favor of plaintiff, and certified to the supreme court certain points for its determination. Affirmed.

W. B. Phelps and Charles C. Teare, for plaintiff.

Davis, Hollister & Hicks, Henry J. Grannis, and Davis, Kellogg & Severance, for defendant.

The land-grant legislation, acceptance by the railroad company, its compliance with the terms, and conveyance by the state to it created a contract that the lands should not be subject to taxation for five years after the conveyance, unless previously sold or disposed of. The state may make such a contract. *Cooley*, Const. Lim. 280; *Fletcher v. Peck*, 6 Cranch, 87; *State v. Wilson*, 7 Cranch, 164; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *Farrington v. Tennessee*, 95 U. S. 679; *McGee v. Mathis*, 4 Wall. 143; *Gordon v. Appeal Tax Court*, 3 How. 133; *Van Hoffman v. City of Quincy*, 4 Wall. 535; *Chicago v. Sheldon*, 9 Wall. 50; *Wilmington R. v. Reid*, 13 Wall. 264; *Humphrey v. Pegues*, 16 Wall. 244; *Asylum v. New Orleans*, 105 U. S. 362. See also *First Div. St. P. & P. R. Co. v. Parcher*, 14 Minn. 224 (297); *State v. Winona & St. P. R. Co.*, 21 Minn. 315; *Chicago, M. & St. P. Ry. Co. v. Pfaender*, 23 Minn. 217; *City of St. Paul v. St. Paul & S. C. R. Co.*, 23 Minn. 469; *County of Stevens v. St. Paul, M. & M. Ry. Co.*, 36 Minn. 467; *State v. Luther*, 56 Minn. 156; *State v. Stearns*, 72 Minn. 200; *County of Traverse v. St. Paul, M. & M. Ry. Co.*, 73 Minn. 417.

The legislature had authority to make the contract of exemption, unless the constitution in terms restrained it from so doing. No such prohibition existed. *People v. Auditor*, 7 Mich. 84; *City of St. Paul v. St. Paul & S. C. R. Co.*, supra. The state having deeded the lands pursuant to the grant and having for many years refrained from taxing them, this practical recognition by the legislative and executive departments is entitled to weight. *State v. Luther*, supra; *County of Traverse v. St. Paul, M. & M. Ry. Co.*, supra; *State v. Winona & St. P. R. Co.*, supra; *City of St. Paul v. St. Paul & S. C. R. Co.*, supra; *State v. County*, 19 Ark. 360; *McGee v. Mathis*, supra; *Wisconsin v. Taylor*, 52 Wis. 37; *State v. Commissioner*, 37 N. J. L. 240; *Francis v. Atchison*, 19 Kan. 303; *Illinois v. County*, 17 Ill. 291; *City v. Portland*, 67 Me. 135; *Louisiana v. City*, 24 La. An. 86; *McHenry v. Alford*, 168 U. S. 651; *Mississippi v. Cook*, 56 Miss. 40; *State v. North*, 27 Mo. 464.

Laws 1895, c. 168, attempting in general terms to repeal all laws exempting railroad lands from taxation, impairs the obligation of the contract, and violates the constitution of the United States and of the state in that regard. *Fletcher v. Peck*, supra; *Van Hoffman*

v. *City of Quincy*, supra; *McGee v. Mathis*, supra; *State v. Wilson*, supra; *Farrington v. Tennessee*, supra. The United States supreme court will not be bound by the decisions of a state court as to whether a contract protected by the constitution exists. *Jefferson Branch Bank v. Skelly*, supra; *McCullough v. Virginia*, 172 U. S. 102, 109. The acceptance by the railroad company of the Taylor's Falls act and payment of taxes on its gross earnings ever since, created a contract with the state that such gross-earnings tax should be in lieu of all other taxation. Whether there was a contract and whether it has been impaired are questions for the federal court, though in deciding them it may be necessary to construe the state law and constitution. *Columbia Water P. Co. v. Columbia Electric St. Ry. L. & P. Co.*, 172 U. S. 475, 487; *McCullough v. Virginia*, supra. The supreme court of the United States passed on this question in *McHenry v. Alford*, 168 U. S. 651. No question of exemption of property is involved. *City of St. Paul v. St. Paul & S. C. R. Co.*, supra; *State v. Luther*, supra. The constitutional amendment of 1871 validated the Taylor's Falls act. The state could not impair the contract by subsequent legislation, unless authority was reserved. If there was any reservation, it was not broad enough to authorize taxation of railroad lands by one method and of other railroad property by another, as was attempted by Laws 1895, c. 168. If any change was authorized it was to repeal the whole gross-earnings tax law, or to change it as applied to all the property of the railroad companies, lands included. *First Div. St. P. & P. R. Co. v. Parcher*, supra; *Chicago, M. & St. P. Ry. Co. v. Pfaender*, supra; *County of Stevens v. St. Paul, M. & M. Ry. Co.*, supra; *County of Traverse v. St. Paul, M. & M. Ry. Co.*, supra; *Ferris v. Vannier*, 6 Dak. 186; *Northern v. Barnes*, 2 N. D. 310, 332; *Kittanning v. Com.*, 79 Pa. St. 100; *State v. Runyon*, 41 N. J. L. 98; *City v. Kaufman*, 29 La. An. 283; *Wisconsin v. Taylor*, supra; *Trustees v. State*, 46 Iowa, 275; *State v. North*, supra; *Mississippi v. Cook*, supra; *Illinois v. County*, supra; *Francis v. Atchison*, supra.

CANTY, J.

The delinquent list of real-estate taxes assessed in St. Louis

county in 1897 included many parcels of real estate owned by the Duluth & Iron Range Railroad Company. The list was filed in the clerk's office, and application made for judgment against the lands. Thereupon the railroad company interposed an answer. On the trial of the issues thus raised, the court below found against the railroad company on every point, and certified all of the points to this court.

The railroad company was organized under the general laws of this state. Thereafter, by Sp. Laws 1875, c. 54, the legislature granted to it certain lands to aid in the construction of its railroad. The act contains this clause:

"Provided, That none of the lands hereby granted shall be subject to taxation until the expiration of five years from the issuance of the patent by the state, unless previously sold or disposed of by said railroad company."

When the 1897 tax was assessed and levied, the patents had been issued for the lands here in question, but had not been issued five years prior to such assessment or levy. These lands were granted by congress to the state to aid in the construction of public improvements, and were held by the state in trust for that purpose. Various acts were passed between 1875 and 1885 extending the time for the completion of its road by the railway company. It commenced the construction of the same in 1883, and completed it in December, 1886. By Sp. Laws 1873, c. 111, the legislature provided that the St. Paul, Stillwater & Taylor's Falls Railroad Company should pay a certain gross-earnings tax in lieu of all other taxation on its railroad and appurtenances, and on all other property, "including the lands granted to said company to aid in the construction of its said railroad." The act further provided that any other railroad company then or thereafter owning or operating a railroad within this state could, by resolution of its board of directors filed with the secretary of state, accept, and become subject to the provisions of, the act. The board of directors of the Duluth & Iron Range Railroad Company passed such a resolution, which was filed with the secretary of state June 3, 1884.

By Laws 1895, c. 168, the legislature provided for submitting the provisions of the act to a vote of the people, by which provisions

it is declared that all such railroad lands shall be subject to taxation. In *State v. Stearns*, 72 Minn. 200, 75 N. W. 210, we held that the act was duly passed and properly submitted, and was duly ratified by popular vote pursuant to the 1871 amendment to the constitution, known as section 32a, art. 4. Counsel for the railway company contend that said chapter 168 is unconstitutional because it impairs the obligation of the contract made between the state and such railway company by said chapter 111, and the resolution adopted and filed pursuant thereto. This contention was completely disposed of in the above-mentioned decision, and it is unnecessary to say anything further on that point.

Counsel further contend that chapter 168 is unconstitutional because it impairs the obligation of the contract made between the same parties by said chapter 54. This question, also, is substantially disposed of by *State v. Stearns*, and all of the reasons given in that case apply here. Under the provisions of our constitution requiring uniformity of taxation, and requiring all property, except certain specified exemptions, to be assessed for taxation according to its true value in money, the legislature had no power to pass a gross-earnings law, except as permitted by said constitutional amendment of 1871. True, these lands were conveyed for a public purpose; and it may be conceded that, in the absence of constitutional provisions prohibiting it, the legislature might, in aid of such purpose, have granted the lands exempt from taxation. But we are of the opinion that, under our constitutional provisions requiring uniformity of taxation, the legislature cannot, even in aid of a public purpose, make an irrevocable contract exempting private property from future taxation, because, even if it is admitted that thereby the legislature did nothing more than anticipate such future taxes, and apply them in advance to a specific public purpose, still it is impossible for the legislature to tell at present what in such a case will be uniform taxation in the future, or that by such arrangement such property will bear its just and equal share of such future taxation.

The order and judgment of the court below are affirmed.

TRAVELERS' INSURANCE COMPANY OF HARTFORD v. MARY J.
WALKER and Another.

October 23, 1899.

Nos. 11,721—(33).

Ejectment—Allegation of Title—General Denial—Equity of Defendant.

Where the complaint in an action of ejectment alleges the plaintiff's title generally, without disclosing the source of it or his right of possession, if the defendant has an equity which, as it exists, and without any affirmative relief, defeats the plaintiff's right of possession, it may be proved under a general denial, being strictly defensive. But if the equity is such that it does not give the defendant the right of possession, as against the legal title, without affirmative relief enforcing it, then he must plead the facts entitling him to such relief, the matter being in the nature of a counterclaim. Rule applied, and *held*, that the defense which the defendants herein offered to prove falls within the first subdivision thereof.

Action in the district court for Stevens county to recover possession of land and \$1,500 damages for withholding the same. The case was tried before Qvale, J., who directed a verdict in favor of plaintiff; and from an order denying a motion for a new trial, defendants appealed. *Reversed*.

Lewis C. Spooner and John P. Rea, for appellants.

William C. Bicknell, Fred E. Smith, and S. A. Flaherty, for respondent.

START, C. J.

Action of ejectment to recover possession of a section of land in the county of Stevens.

The complaint alleged that the plaintiff is, and has been since May 4, 1896, the owner in fee of the premises, and that the defendants are now, and ever since that date have been, in the unlawful possession thereof, and unlawfully and without right or title withhold the same from the plaintiff. The answer, in effect, was a general denial, except it admitted that the defendants were in possession of the premises. The prayer of the answer was for a dismissal of the action. On the trial the plaintiff introduced in evidence a

mortgage on the premises executed by the defendants as security for a loan, and proved a foreclosure of the mortgage by advertisement regular on the face of the proceedings, and a sale thereunder to itself on May 4, 1895, for the full amount claimed in the notice of sale, and rested.

Thereupon the defendants offered to prove, in effect, that the plaintiff claimed in its notice of the foreclosure of the mortgage \$3,000 more than the amount of the mortgage debt, and that for that reason they objected to the foreclosure proceedings; that the plaintiff then conceded that the amount claimed was excessive, but stated that it did not then have at hand the data for ascertaining the true amount of the mortgage debt; that thereupon it was agreed between the parties that if the defendants would not resist the foreclosure sale, and would permit the plaintiff in form to consummate the foreclosure, and the defendant Mary J. Walker would permit it to retain certain other securities (to her belonging) for the payment of the mortgage debt, and also execute to it her note for \$1,000, to be secured by a chattel mortgage on the crops to be raised on the premises in the year 1895, as further collateral security for the payment of the mortgage debt, the defendants should be entitled to retain the undisturbed possession of the premises until the true amount due upon the mortgage debt should be ascertained, and that the plaintiff would hold the certificate of sale to be issued on such foreclosure, and the collateral security, including the note and chattel mortgage for \$1,000, as security for the payment of the actual amount due on the real-estate mortgage to be foreclosed, which amount was to be paid by the defendants when the amount thereof was ascertained by an accounting between the parties; that the defendants, and each of them, performed all of the conditions of the agreement on their part in reliance thereon; that the \$1,000 note so given as collateral security was duly paid, with other sums, in reduction of the true amount of the mortgage debt; that the plaintiff refuses to account with the defendants, and the amount due the plaintiff has never been ascertained, but the defendants are willing and able to pay to the plaintiff the full amount due to it on account of its mortgage debt as soon as it can be ascertained or established.

The plaintiff objected to the evidence offered, on the ground that the action was one at law to recover on a legal title, and that the offer indicated that the defendants relied upon an equitable defense, and the evidence to prove it was not admissible, because the defense was not pleaded. The trial court sustained the objection, excluded the evidence, and instructed the jury to return a verdict for the plaintiff. The defendants appealed from an order denying their motion for a new trial.

No claim is, or can be successfully, made that the facts offered to be proven would not constitute a defense to the action. The only question, then, on this appeal, is whether the defendants were bound to plead specially the defense they sought to prove. The rule of pleading, as to when and when not the defendant must specially plead his defense to an action of ejectment, where it is of an equitable nature, and the plaintiff has not alleged in his complaint the nature or source of his title, was tersely and clearly stated by Justice Mitchell in his concurring opinion in the case of *Freeman v. Brewster*, 70 Minn. 203, 72 N. W. 1068. It is this: Where the complaint in an action of ejectment merely alleges the plaintiff's title generally, without disclosing the source of his title or right of possession, if the defendant has an equity

"Which, as it exists and without any affirmative relief, defeats plaintiff's claim to the possession, it may be proved under a general denial, being strictly defensive in its nature. But, if the equity is such that it does not give the defendant the right of possession as against the legal title without affirmative relief enforcing the equity, then the defendant must plead the facts entitling him to such relief, the matter being in the nature of a counterclaim."

Or, in other words, if it be such an equity as negatives the plaintiff's right of possession, then it is a defense, and may be proved under a general denial. But if the defendant holds under a contract which does not of itself give him the right of possession, but does give him a right to demand a specific performance of the contract by the plaintiff, upon which his right to retain possession of the premises depends, he must plead the facts entitling him to such relief. *Dale v. Hunneman*, 12 Neb. 221, 10 N. W. 711; *Newell, Ej.* 681, § 56; *Bliss*, Code Pl. § 349.

The only question in this case is whether the defendants' offer brings the case within the first or second subdivision of the rule we have stated. Clearly, within the first, for the defendants offered to prove a contract which by its terms gave them the right to retain possession of the premises until an accounting between the parties could be had. The contract was based upon a valuable consideration. The defendants were not in default, for they had performed all of the conditions of the contract on their part, and the accounting, which was to terminate their right to possession under the contract, had not been had by reason alone of the plaintiff's default. If the terms of the contract were such that the defendants were not entitled to possession until it had been specifically performed on the part of the plaintiff, or the defendants themselves were in default and dependent on a court of equity to relieve them, we should have a case falling under the second subdivision of the rule. Such were the cases of *Williams v. Murphy*, 21 Minn. 534, and *Freeman v. Brewster*, *supra*, relied upon by the plaintiff.

If the offer of the defendants in this case was true, they were not obliged to call upon the court to decree an accounting and a specific performance of the contract by the plaintiff as a basis for maintaining their right of possession, or to ask the court to relieve them from any default, for their right of possession rested upon the terms of a contract which they had performed. The defendants might have specially pleaded the facts they offered to prove as a counterclaim, and invoked the equitable powers of the court to decree an accounting and specific performance by the plaintiff; but the fact remains that they have not done so, but have elected to stand simply on the defensive. Whether their proposed defense be treated as an equitable one, as counsel on both sides seem to regard it, or in effect a legal one, it was not necessary to plead it specially. See *Kipp v. Bullard*, 30 Minn. 84, 14 N. W. 364; *Com. Title Ins. & Trust Co. v. Dokko*, 72 Minn. 229, 75 N. W. 106.

It follows that the trial court erred in excluding the defendants' offer of evidence, and that the order appealed from must be reversed, and a new trial granted. So ordered.

CANTY, J.

In concurring, I do not wish to be understood as conceding that this case is at all analogous to one where the plaintiff has the legal title, and the defendant either an equitable title or a mere enforceable equity. If the facts which the defendants offered to prove are true, the plaintiff has no title at all, and the defendant Mary J. Walker has the legal title; the plaintiff is a mere mortgagee of an unenclosed mortgage, and defendant Walker is mortgagor holding the legal title; and the rule, "Once a mortgage always a mortgage," applies with full force. Then the case is much stronger in favor of defendants than it would be if Mary J. Walker held merely an executory contract of purchase, whether she was in default or not.

FRANK MARQUARDT v. HERMAN HUBNER.

October 23, 1899.

Nos. 11,800—(176).

Judgment notwithstanding Verdict—Cruikshank v. St. Paul F. & M. Ins. Co. Followed.

Held, following Cruikshank v. St. Paul F. & M. Ins. Co., 75 Minn. 286, that Laws 1895, c. 320, authorizes a judgment notwithstanding the verdict only in cases where it is clear upon the whole record that the moving party is, as a matter of law, entitled to judgment on the merits. It is not sufficient, to warrant such judgment, that the evidence was such that the trial court, in its discretion, ought to have granted a new trial.

Same—Evidence.

Evidence considered, and *held*, that the trial court erred in granting defendant's motion for judgment notwithstanding the verdict.

Action in the municipal court of Mankato to recover \$75 for services rendered. The case was tried before Shissler, J., and a jury, which rendered a verdict in favor of plaintiff for \$30.25. The court granted a motion for judgment notwithstanding the verdict; and from a judgment entered pursuant thereto, plaintiff appealed. Reversed.

C. O. Dailey, for appellant.

Wm. N. Plymat, for respondent.

START, C. J.

This is an action to recover the reasonable value, less certain payments, of services rendered by the plaintiff between January 12 and July 3, 1898, as a farm laborer for the defendant. The answer alleged that the services were rendered pursuant to an entire contract, whereby the plaintiff agreed to work for the defendant for 10 months from and after January 12, 1898, for the entire sum of \$184, and that on July 3, 1898, he, without any lawful justification, abandoned such contract, and refused to further perform it. The reply admitted the special contract, and that the services in question were performed under it, but alleged, as a cause for quitting the work, the fact that he was required to work some 16 hours a day, and in the field when it was raining, whereby his health was endangered.

The truth of the allegations of the reply was the only issue submitted to the jury except the value of the services. At the close of the evidence the defendant requested the court to direct a verdict for the defendant, which was denied, to which ruling he excepted. The case was submitted to the jury, and a verdict returned for the plaintiff for \$30.25. Thereupon the trial court, on motion of the defendant, rendered judgment for the defendant on the merits, notwithstanding the verdict, and the plaintiff appealed from the judgment.

The statute (Laws 1895, c. 320) authorizes a judgment notwithstanding the verdict only in cases where it is clear upon the whole record that the moving party, as a matter of law, is entitled to judgment on the merits. It is not sufficient, to warrant such judgment, that the evidence was such that the trial court, in its discretion, ought to have granted a new trial. *Cruikshank v. St. Paul F. & M. Ins. Co.*, 75 Minn. 266, 77 N. W. 958. Testing the record in this case by this rule, it is manifest that the trial court erred in granting defendant's motion for judgment. The evidence given on the trial was such that the jury might have found either way on the issue as to whether the plaintiff had good cause for quitting work. The plaintiff testified:

"I got up every morning, during all the time I worked for the defendant, at a quarter to five o'clock, and did not get through with my work until 9 or 9:30 at night. * * * I also had to work in the rain, in the field, for the defendant, during seeding time and plowing corn. It rained a good deal during corn-plowing time. This work in the rain for the defendant endangered my health. I could not very well stand the long hours of labor I had to perform. I quit work on July 3."

The defendant's testimony, which was corroborated by other witnesses, was to the effect that the plaintiff did not, and was not required to, work 16 hours a day, or any greater number of hours than is customary for farm laborers to do, or in the rain. The credibility of the respective parties was a question for the jury, who found in favor of the plaintiff, and his testimony, for the purposes of this appeal, must be assumed to be true. But the respondent contends that, conceding it to be true, it does not appear that the plaintiff was required by the defendant to work 16 hours a day, and in the rain, and if he did so it was of his own notion, and therefore the evidence fails to show any cause justifying the plaintiff in quitting work. His testimony is that he was up before 5 o'clock in the morning, and did not get through his work until 9 or 9:30 at night, and that he could not well stand the long hours of labor he had to perform. This evidence, if satisfactory to the jury, is sufficient to justify the conclusion that the plaintiff did not get up at the time, and employ himself in the defendant's business for the number of hours each day claimed, for his own pleasure, but that it was necessary for him to do so in order to do the work assigned to him. The defendant was not entitled to a judgment on the merits as a matter of law.

Judgment reversed, and case remanded, with directions to the trial court to enter judgment on the verdict for the plaintiff.

CANTY, J.

I am of the opinion that the evidence is not sufficient to sustain a verdict for plaintiff. But it is fairly to be inferred from the evidence that it is defective in this respect merely because plaintiff, in his testimony on his own behalf, failed to express in language the meaning he intended to convey. While, under these circumstances,

defendant was entitled to a new trial, he was not entitled to judgment notwithstanding the verdict; but he never asked for a new trial. The order appealed from should, therefore, in my opinion, be reversed, without any further directions to the court below.

E. P. ALEXANDER v. CITY OF DULUTH and Others.

October 23, 1899.

Nos. 11,873—(204).

77	445
84	879
77	445
85	489

Constitution—General Laws for Cities—Classification by Population.

So much of section 36 of article 4 of the state constitution as relates to the classification of cities on the basis of population authorizes the legislature to classify, for the purpose of general legislation, cities on the basis of population, although such basis would not otherwise be germane to the purpose or subject-matter of the proposed law; but, other than this, the provisions of sections 33 and 34 of article 4, relating to special legislation, are not affected thereby.

Same.

While it is true, as a general rule, that classification with a view to the enactment of general laws cannot be based upon existing circumstances only or those of a limited duration, yet a distinctive class may be based upon existing conditions, when the purpose of the law is temporary only.

Laws 1899, c. 50—Bonds for Floating Debt—Constitution.

Laws 1899, c. 50, authorizing cities of a designated class to issue bonds to take up their floating indebtedness, construed, and held to be a general law, and constitutional, for the reason that its purposes are temporary and remedial only.

Action in the district court for St. Louis county by plaintiff, a resident and tax payer in defendant city, against the city of Duluth, and its mayor, comptroller, and clerk, and the president and members of its common council to enjoin the issue of bonds. From an order, Moer, J., sustaining a demurrer to the complaint, plaintiff appealed. Affirmed.

L. C. Harris, for appellant.

Population is not a proper basis of classification for an act of this

character. There is no necessary or natural relation between population of cities and the condition of their floating indebtedness. *State v. City*, 42 N. J. L. 486. If population be a proper basis, the act is nevertheless unconstitutional, because its provisions are limited to cities having the required population at a given time. The act must operate not only equally and uniformly on all members of the class at the time of enactment, but must operate on all members that will grow into the class. *State v. Cooley*, 56 Minn. 540, 551; *State v. Mayor*, 45 N. J. L. 297. The act is unconstitutional because it is limited to cities that proceed to act under it within six months, and also to cities having a floating indebtedness at the date of its passage. The act thus makes an arbitrary and unreasonable distinction between members of the same class. There may be subdivisions of classification under proper circumstances, but the distinctions must be based on substantial grounds and not on arbitrary reasons. *Nichols v. Walter*, 37 Minn. 264, 272.

J. B. Richards, attorney for city of Duluth, for respondent.

In view of the constitutional amendment (Laws 1899, p. vi.), the act is constitutional. Independently of the amendment, the special features of the act make it proper. *State v. Sullivan*, 72 Minn. 126. The act legislates for a whole class, and is merely limited in time of duration; that is, it is a temporary general law. *People v. Wright*, 70 Ill. 388; *Potter's Dwarrris*, St. 74; 2 *Bouvier*, Law Dict. 573. A general law relating purely to existing conditions may be passed for temporary purposes only. *Cobb v. Bord*, 40 Minn. 479; *State v. Cooley*, 56 Minn. 540, 548; *Flynn v. Little Falls E. & W. Co.*, 74 Minn. 180; *State v. City of Thief River Falls*, 76 Minn. 15; *Iowa v. Soper*, 39 Iowa, 112. See *In Matter of New York*, 70 N. Y. 327; *In re Church*, 92 N. Y. 1; *People v. Square*, 107 N. Y. 593; *Ferguson v. Ross*, 126 N. Y. 459; *In re People*, 146 N. Y. 357; *Haskel v. City*, 30 Iowa, 232. The act is not unconstitutional on the ground that no city can take advantage of it after six months. *State v. Cooley*, *supra*; *Cobb v. Bord*, *supra*.

START, C. J.

This is an action to enjoin the city of Duluth from issuing and

negotiating its bonds to the amount of \$500,000 to take up its floating indebtedness. The plaintiff appealed from an order sustaining a general demurrer to his complaint.

The defendant claims that it is authorized to issue the bonds by Laws 1899, c. 50. Is this statute constitutional? This is the only question for our decision meriting special consideration, and the answer to it must be in the affirmative. The provisions of this statute may be summarized as follows:

Section 1. The common council of any city, at any time having a population of more than 50,000 according to the last state census, is authorized to issue and sell the bonds of any such city for the purpose of taking up and funding its floating indebtedness. Section 2 provides for the manner of issuing the bonds. Section 3. No city shall be permitted to issue bonds for funding any of its floating indebtedness except such as exists at the date of the approval of this act, nor shall any such city be entitled to avail itself of the provisions of this act unless it shall proceed to do so within six months from the date of such approval. Section 4. Any city, which has already reached the limit of its bonded or other indebtedness, which avails itself of the provisions of this act, shall thereafter have no power to create any obligation which shall bear interest, except such as may be in renewal of an obligation now existing, and no officer or officers of such city shall have power to draw any order on its treasury, or issue any evidence of indebtedness, other than a bond, unless there is then sufficient money in the treasury to the credit of the fund out of which it is payable to pay the same, together with all unpaid claims previously audited against the fund. Every order or evidence of indebtedness issued contrary to the provisions of this section shall be void in the hands of everybody. Section 5. This act shall be in force from and after its passage.

The plaintiff claims that this act is unconstitutional, because it is special legislation prohibited by sections 33 and 34 of article 4 of the state constitution. The specific objections which he urges against the validity of the act are: First, it adopts an improper basis of classification, namely, population; second, it is based upon

existing circumstances only, and is limited to the members of the class at the time of its enactment.

1. The plaintiff, in support of his first objection, urges that the attempted classification of cities on the basis of population is not germane to the subject-matter or purpose of the act, for the reason that there is no natural connection or relation between the number of people in a city and the propriety or necessity of funding its floating indebtedness.

The constitutional prohibition of special legislation on a particular subject does not deprive the legislature of the power to classify it if the basis of classification is germane to the purpose of the law. Population may be a basis of such classification, if germane to the subject or purpose of the proposed law. The subject of classification on the basis of population has been an embarrassing one for the courts, for the reason that numerous and complex considerations enter into it, and in practice it is often difficult to determine whether there is any natural relation between the population of cities of a given class and the subject-matter of the law classifying them. This difficulty has been eliminated by the adoption of an amendment to the constitution,—section 36, art. 4 (Laws 1899, p. vi.),—the here material provisions of which are these:

“The legislature may provide general laws relating to affairs of cities, the application of which may be limited to cities of over fifty thousand inhabitants, or to cities of fifty and not less than twenty thousand inhabitants, or to cities of twenty and not less than ten thousand inhabitants, or to cities of ten thousand inhabitants or less, which shall apply equally to all such cities of either class.”

It is manifest that the purpose of this amendment was not practically to repeal sections 33 and 34 of article 4 of the constitution, as to cities which might be classified pursuant to its provisions, but that its object was to enable the legislature to make population a basis of classification, although there might not be any natural relation between the subject-matter of the proposed law and the number of people in the classified cities. We accordingly hold that the amendment authorizes the legislature to classify, for the purpose of general legislation, cities on the basis of population therein specified, although such basis would not have previously been germane

to the purpose or subject-matter of the proposed law, but that otherwise the provisions of sections 33 and 34 of article 4 are not affected by the amendment. It follows that the plaintiff's first objection is answered by the constitution, and must be overruled.

2. The plaintiff, in support of his second general objection, that the act is based upon existing circumstances only, and is limited to the members of the class at the time of its enactment, urges that the provisions of the act are limited to cities having the required population at a given time,—the date of the last state census; also to cities having a floating indebtedness at the date of the passage of the act, which proceed to act upon such provisions within six months from such date. It must be conceded that such are the provisions of the act, and that it does not necessarily operate alike upon all cities having a population of more than 50,000 at the date of the passage of the act, nor upon cities which thereafter acquired such population.

The rule is well settled that classification with a view to the enactment of general laws must not be based upon existing circumstances only or those of limited duration, except where the object of the law is itself a temporary one. The exception to the rule is as firmly established as the rule itself, and a distinctive class may be based upon existing conditions, when the purposes of the law are temporary only. *Cobb v. Bord*, 40 Minn. 479, 42 N. W. 396; *State v. Cooley*, 56 Minn. 548, 58 N. W. 150; *Flynn v. Little Falls E. & W. Co.*, 74 Minn. 180, 78 N. W. 106; *State v. City of Thief River Falls*, 76 Minn. 15, 78 N. W. 867; *Iowa v. Soper*, 39 Iowa, 112; 32 Am. Law Reg. 851. But not all existing conditions are a proper basis of classification, although the purpose sought be temporary. They must be of such a character as suggests a practical (not absolute) necessity or propriety of different legislation with respect to the subjects placed in different classes. *Nichols v. Walter*, 37 Minn. 272, 33 N. W. 800. The origin or cause, however, of the existing conditions, whether it be unforeseen disaster or official incompetency, goes not to the power of the legislature to make them the basis of classification, but to the propriety of doing so.

If we keep in mind these general principles while reading the act in question, our attention is at once challenged by the fact that it

is a complete and independent law, and that the basis of classification is an existing condition,—that is, the present floating indebtedness of the cities of the state having a population of over 50,000,—and that its purposes are only temporary and remedial; and, further, that the act recognizes that the continuance of a floating debt of such cities in excess of their incomes is an evil which ought promptly to be remedied, but not repeated in the future. The purpose, then, of the legislature in enacting this law lies upon its face. The purpose was to enable such cities to fund their floating indebtedness, thereby reducing the interest, and relieving themselves of the embarrassment of a past-due floating indebtedness, which they were then unable to pay, but not to authorize or encourage a repetition of the folly of contracting debts with nothing to pay them.

To carry out this purpose, it was deemed wise by the legislature to require such cities to proceed to exercise the power conferred upon them to issue bonds to fund their floating indebtedness within six months after the power was conferred, and to prohibit the issue thereafter of any order or evidence of indebtedness of such cities unless the money with which to pay it was in the treasury. To have extended the provisions of the law to cities which might thereafter grow into the class would have been an implied invitation and an inducement to such cities to incur the very evil the law was intended to remedy and to prohibit as to the future. Hence there were good reasons why the provisions of the act should be limited to cities of the class that then had a floating indebtedness, and to those that proceeded to avail themselves thereof within six months after the passage of the act. It is clear that the purposes of the act in question are merely temporary and remedial, and that the existing conditions, which are made a basis of classification, are of such a character as fairly to suggest the propriety of different legislation as to the cities classified; and, further, that during the time of its existence its provisions apply to every city of the prescribed class which desires to avail itself of the provisions thereof. It is therefore a general, not a special, law, within the meaning of the constitution.

Order affirmed.

CANTY, J. (dissenting).

I cannot concur. The three cities in this state having each over 50,000 inhabitants are Duluth, St. Paul, and Minneapolis. Each of these cities is governed by a number of special laws, which, taken together, constitute its charter, and which were enacted by the legislature before the constitutional amendment adopted in 1892 prohibiting such special legislation. Each of these charters is radically different from the others. There is one limitation on the amount of bonded indebtedness of Duluth, another as to the amount of bonded indebtedness of Minneapolis, and no limitation at all as to the amount of the bonded indebtedness of St. Paul, except as to the amount which may be incurred for park purposes, which is not material here. Laws 1899, c. 50, purports on its face to include these three cities in one class, and I agree with the majority of the court that, under the constitutional amendment adopted at the last election, it is now proper to include all cities of over 50,000 inhabitants in one class, whether population is or is not a proper basis of classification as regards the particular subject of legislation. But in all other respects the classification must still be a proper one.

The subject of legislation in chapter 50 is limitation on the amount of bonded indebtedness in the cities of the class. The legislature must now treat all the members of the class alike. If St. Paul is to be permitted to go without any limitation as to the amount of her bonded indebtedness, the legislature cannot by any pretended general law change the limit as to Duluth or Minneapolis otherwise than by removing all limitations as to them also. This principle is laid down by the repeated decisions of this court and the courts of other states having such constitutional prohibitions against special legislation. But chapter 50 does not treat all the members of the class alike. It raises the limit of the amount of the bonded indebtedness, and fixes a new limit, as to Duluth, while it leaves the limit as to Minneapolis unchanged, and permits St. Paul to go without any limit at all. This is justified on the pretext of providing for temporary existing conditions, and it is held that the legislature was warranted in adopting the policy that they would cure the present evil, without encouraging the repetition of the evil in the future, and therefore had a right to make the law

apply only to existing, and not to future, floating indebtedness. My answer is that, under the constitution, if the legislature acts at all, it can adopt no policy in the matter except to repeal all limitations on bonded indebtedness as to the other members of the alleged class while St. Paul is permitted to go wholly without limitation. If, under these circumstances, it is unconstitutional to make a permanent change in the bond limit of Duluth alone, it is equally so to make a temporary change as to such limit.

A special law cannot be rendered general by making it still more special in some other respect. Limiting this law to present conditions does not in the least remove the objection I have referred to. In fact, it is, in my mind, a question whether limiting the law to present, existing conditions does not, of itself, make the law special. But I will not discuss that question now. There is no exigency or occasion for this act except the mere fact that there is a bond limit in the charter of Duluth, while there is none in the charter of another member of the alleged class. But the pretense of adopting all cities of over 50,000 inhabitants as a basis of classification in this act is a mere sham. If the act had not used words to conceal its thoughts, but had used plain, straightforward language, it would have named Duluth as the city to which it applied, and would have referred in no manner to any other city. It would simply have provided for raising the bond limit of Duluth by the amount of its present floating indebtedness, but to no greater extent. Whether this is a temporary or a permanent change in the bond limit of Duluth, it is a simple and clear case of special legislation, and comes directly within the principle of the case of *State v. Ritt*, 76 Minn. 531, 79 N. W. 535, decided but a few months ago.

It seems to me that chapter 50 is the most vicious piece of special legislation that has come before this court since the adoption of the constitutional amendment of 1892, and the decision of the majority throws the door wide open, not to reasonable special legislation, but to special and temporary patchwork, the most vicious of all special legislation. All the legislature has to do after this is to fail and refuse to pass general laws on any particular subject until there is a present crying necessity for legislative redress, and then seize on the present existing circumstances of such present neces-

sity as constituting a proper class for which to legislate and pass an act which applies only to the present case, and will not apply to future cases as they arise. I cannot see the constitution set aside and perverted in this manner without protesting.

STATE ex rel. CITY OF ST. PAUL and Another v. WILLIAM B. JOHNSON.

October 23, 1899.

Nos. 11,942—(216).

77	453
79	202
79	203
79	204
79	207
79	210

Laws 1899, c. 40, Unconstitutional—School District.

Held: Laws 1899, c. 40, is special legislation regulating the affairs of school districts. It is, in effect, an attempt to adopt as part thereof the provisions of a number of diverse and special laws relating to the management of public schools in three cities, of over 50,000 inhabitants each, in this state, and therefore contravenes sections 33 and 34 of article 4 of the constitution, prohibiting such special legislation, and is void.

Alternative writ of mandamus issued by the district court for Ramsey county to compel respondent, as county auditor of said county, to calculate the rate per cent. on the assessed valuation of the taxable property of the city of St. Paul necessary to raise the sum of \$112,000, and to extend the same on the tax rolls. From an order, Brill, Otis, Bunn, Lewis, and Jaggard, JJ. (Kelly, J., dissenting), directing a peremptory writ to issue, respondent appealed. Reversed.

Horace E. Bigelow and Fred W. Zollman, for appellant.

Walter L. Chapin, for respondents.

Under Const. art. 4, §§ 33, 34, the test to determine whether a law is special or general is the law itself, not the sum total of all the legislation past and present on the subject. The law is general and uniform if the results flowing from it alone are uniform in all the cities of the class to which it applies. So far only as such general laws are inconsistent with prior special laws are the special laws to give way. The constitution in terms requires uniformity only

in future laws. The act in question is uniform in its operation. It confers a power of taxation on the cities as a class equal as to all. *State v. Sullivan*, 72 Minn. 126, 132. If it is also a general law, all the requirements are fulfilled. Under Const. art. 4, § 36 (Laws 1899, p. vi.), legislation in city affairs which applies to cities of over 50,000 inhabitants is authorized. On grounds of public policy, it is desirable that, as cities grow, methods of raising money for schools should differ from those in smaller communities. This is matter largely for legislative judgment and discretion, which will not be interfered with by the courts. So many reasons exist why different powers and restrictions should prevail, that it sufficiently appears that the classification is not arbitrary. *State v. Sullivan*, supra; *State v. Spaude*, 37 Minn. 322; *State v. Cooley*, 56 Minn. 540, 545; *State v. Central*, 48 N. J. L. 146, 310; *State v. Hoagland*, 51 N. J. L. 62. The law is not based on other laws, and hence *Alexander v. City of Duluth*, 57 Minn. 47, 49, and *Bowe v. City of St. Paul*, 70 Minn. 341, do not apply. *State v. Copeland*, 66 Minn. 315, did not turn on whether the law was special because founded on other laws, but whether it lacked the uniform application required by Const. art. 4, § 34. It is contended that the law must be read with the city charter and that so interpreted it provides as a matter of construction of this law that the total levy in St. Paul may be four mills, in Minneapolis five and one-half mills, etc. This contention is contradicted by the law itself, but if the law were so construed it would follow that when the charters are repealed this act would be incapable of intelligent interpretation, which is an absurdity. The court will construe a law as constitutional if susceptible of such construction. *State v. Schoenig*, 72 Minn. 528, 532. Const. art. 4, §§ 33, 34, were not intended to require repeal of existing special laws as a condition to future legislation, but exacted uniform and general legislation for the future. *State v. Egan*, 64 Minn. 331, 336; *State v. Sullivan*, supra.

The actual levy of the tax should be by resolution of the council, and is not dependent on prior tax estimates or other provisions of local law, as the new enabling act is independent of prior special acts. 1 Dillon, *Mun. Corp.* § 258 et seq.; *State v. Common Council of City of St. Paul*, 25 Minn. 106, 109. It may be doubted whether

the act modifies existing special laws; but if it does, this is legitimate. A repeal by general law is proper. *State v. Sullivan*, supra; *State v. Copeland*, supra. The restrictions against legislation should not be given a scope beyond what the people had in mind when adopting them. *State v. Sullivan*, supra.

CANTY, J.¹

Laws 1899, c. 40, is assailed as unconstitutional special legislation. So far as here material, section 1 of the act provides as follows:

"Section 1. Cities now or hereafter having over 50,000 inhabitants are hereby empowered to raise annually by taxation, independently of and in addition to other sums for school purposes, authorized by law, an amount not exceeding one and one-half (1½) mills on each dollar of the assessed valuation of taxable property within such city," for school purposes.

St. Paul comes within the class of cities designated in the act, and on September 11, 1899, the city council of that city, under and pursuant to this act, appropriated \$112,000 for the support of the public schools of the city, in addition to the amount already appropriated by the council for school purposes under the special law regulating the public schools of that city. The county auditor of Ramsey county refused to extend said sum of \$112,000 upon the tax rolls of the city, and mandamus was brought to compel him to do so. The court below held said chapter 40 constitutional, and ordered the writ to issue. The auditor appeals.

The cities falling within the class at the time of the passage of the act and at the present time are Duluth, St. Paul, and Minneapolis. Before the passage of this act the maximum limit of annual taxation for school purposes was different in each of these three cities. The limit in Duluth was that provided by the general school law (see Sp. Laws 1891, c. 312, § 13), which was 9 mills on the dollar prior to 1899 (see G. S. 1894, § 1558), and by the amendment made to the general law by Laws 1899, c. 117, the maximum limit is now 15 mills on the dollar. The limit in St. Paul was 2½ mills on the

¹ BUCK, J., absent.

dollar (see Sp. Laws 1891, c. 36, § 6). The limit in Minneapolis was 4 mills on the dollar (see Sp. Laws 1885, c. 86).

Section 33 of article 4 of the constitution provides:

"The legislature shall pass no local or special law regulating the affairs of, or incorporating, erecting or changing the lines of any county, city, * * * school district, * * *. The legislature may repeal any existing special or local law, but shall not amend, extend or modify any of the same."

Section 34 provides:

"The legislature shall provide general laws for the transaction of any business that may be prohibited by section one of this amendment, and all such laws shall be uniform in their operation throughout the state."

The majority of the court, including myself, are of the opinion that the $1\frac{1}{2}$ mills on the dollar which chapter 40 authorizes to be levied in each city of the class must be levied under and pursuant to the diverse and special acts already in force in each city; that is, the legislature has adopted three diverse and special acts as a part of chapter 40. As held in *Alexander v. City of Duluth*, 57 Minn. 47, 58 N. W. 866, this is unconstitutional special legislation. Counsel for respondents contend that, by reason of the provisions of section 2 of chapter 40, it cannot be held that the legislature has adopted as a part of that act all of these diverse provisions of the different general and special acts. Said section 2 reads as follows:

"This act shall be construed as an independent and separate grant of power, and shall in no wise supersede existing provisions of law for raising revenue for the support of schools, whether under general or special laws, but the powers here given may also be exercised concurrently with other powers and to provide a greater revenue for the schools within such city, limitations of power under existing laws notwithstanding."

If this extra mill and a half are not to be levied in each city in the same manner as the other portion of the school tax in that city, then no machinery for levying it has been provided at all, no person, board, or legislative body has been designated to determine whether all or any part of such mill and a half should be levied in each or any year, and the law is inoperative for the want of means

to carry it out. But if, in order to prevent the law from being inoperative, it should be held that the mill and a half should be levied and collected in the same manner as the other portion of the tax is levied and collected, then we have arrived at the place from which we started, and the law is no better because certain things necessary to make it operative are implied than it would be if these things were plainly expressed. Under these circumstances, the declarations of section 2, above quoted, become idle and meaningless.

Speaking for myself alone, I will say that I am also of the opinion that said chapter 40 is special legislation, and repugnant to both of these sections. In order to ascertain the maximum limit for St. Paul, it is necessary to refer to the special law regulating the public schools in that city. In order to ascertain the maximum limit for Minneapolis, it is necessary to refer to the special law regulating the public schools in that city. As applied to these two cities, chapter 40 is, in effect, two amendments,—one to each special law,—thereby preserving and perpetuating all the irregularities in the two laws. True, as applied to Duluth, chapter 40 is an amendment to the general school law, but the result of such amendment is a special law applicable to Duluth alone. Then chapter 40 is, in effect, three amendments,—one to each of the three different laws, two of which were special laws before the amendment,—and, as amended, all three are special laws. Perhaps the best proof of this is seen in the want of uniformity in the result. If chapter 40 is held constitutional, the maximum limit in St. Paul is now 4 mills on the dollar, in Minneapolis $5\frac{1}{2}$ mills, and in Duluth either $10\frac{1}{2}$ or $16\frac{1}{2}$ mills. Could a law which so reads be held constitutional? But it is immaterial how the law reads, such is its effect. True, the amendment is uniform; that is, the same size patch has been put on each special law. But such uniformity in the character of the amendment—in the size of the patch—is not the test of whether the result is a general law. Such want of uniformity in the result is clearly repugnant to said section 34 of the constitution, which requires that laws passed by the legislature shall be uniform in their operation throughout the state. Again, if independent machinery, uniform in its operation, had been provided for

levying and collecting the mill and a half in each city, the act would still be void and repugnant to said section 34, because of want of uniformity in the result. The act providing for the mill and a half would still be based on special legislation, and would be nothing more than a series of uniform amendments, or patches uniform in size, placed on each of the diverse and special acts, thereby preserving and perpetuating all the irregularity and diversity that originally existed in the different laws which were so amended.

The order appealed from is reversed, and the case remanded, with directions to dismiss the proceeding.

MITCHELL, J.

While I concur in the result, I am not prepared to assent to the proposition that the act in question is unconstitutional on the ground that it is not uniform in its operation upon all the cities in the class, as respects the maximum of all taxes that may be levied for school purposes. It seems to me that, as respects the amount of tax authorized by the act, it cannot be said to be based on existing special legislation. In that respect the act itself is uniform in its operation. The inequalities in respect to the maximum amount of taxes which may be levied for school purposes in the different cities of the class already exist, by virtue of existing special legislation, and are neither created nor increased by this act. But I cannot get away from the conclusion that the act is, on another ground, repugnant to the constitutional provision which prohibits the legislature from amending, extending or modifying existing special legislation. I am of opinion that the necessary effect, as well as the manifest intent, of the act, is to adopt the diverse provisions of the existing special legislation contained in the various charters of the cities of the class, relating to the levying, certifying, collecting, etc., of taxes for school purposes, or, more briefly stated, it adopts this special legislation for the purpose of carrying the grant of power into effect. And it is immaterial whether the act does this in express terms, as in *Alexander v. City of Duluth*, 57 Minn. 47, 58 N. W. 866, or by necessary implication.

It is urged by the respondent that authority to a city to do an act is authority to the legislative department of the city, to wit, the city

council, to do the act. It seems to me that this begs the question, and overlooks the fact that in some cities of the class the board of education is the legislative department of the city as to the levy of school taxes and other school matters. But even if it be conceded that under this act the tax in every city is to be voted by the city council, irrespective of special provisions of its charter, the fact remains that as to all other and subsequent steps the provisions of the special charter of each city must be resorted to; otherwise, the act would be nugatory and inoperative.

For considerations of public policy or necessity, the upholding of this act may be a result devoutly to be wished for, but this is no reason for disregarding the plain provisions of the constitution. In my judgment, it was mistaken policy to adopt such a sweeping and ironclad constitutional prohibition of special legislation as to cities in a state where they had been organized and governed for so many years under diverse special charters, thus creating a frequent necessity for special and local remedial legislation. But this was a matter for the people, and not the courts.

COLLINS, J.

I concur in the result reached, but prefer to place my concurrence on the ground adopted by Justice MITCHELL. I am of the opinion that the "necessary effect" and the "manifest intent" of the act referred to by Justice MITCHELL are made more apparent when we find that, 14 days after the passage and approval of chapter 40, the same legislature passed, and the governor approved, another act (Laws 1899, c. 77), which is an exact duplicate, except that in section 1 the words "school districts" were substituted for "cities," and the word "district" for "city." The intention was to adopt the diverse provisions of existing special legislation found in city charters, whether taxes for school purposes were levied and certified by city councils, or by boards of education independent of councils.

START, C. J. (dissenting).

I dissent. The objections urged against the constitutionality of Laws 1899, c. 40, rest, it seems to me, upon the untenable assumption that it is based upon existing special laws, and requires for its enforcement their aid. The act grants to all cities of a given class

the power to raise annually by taxation an amount, in addition to that authorized by existing laws, not exceeding a mill and one-half on each dollar on the assessed valuation of the taxable property of such cities, for school purposes, and to appropriate it therefor.

It is urged that it is special legislation, and therefore unconstitutional, because, in order to ascertain the maximum limit of taxation for school purposes for any city of the class, it is necessary to refer to the special law regulating the public schools in such city, and that it, in effect, amends the charter of each city by increasing the maximum limit of taxation for school purposes. But why is it necessary to ascertain such maximum limit in order to levy this particular tax? There is nothing in the act requiring it, or that increases or diminishes the powers of the cities under their respective charters. The power granted to each city of the class is to raise an amount equal to a mill and one-half tax in addition to that authorized by existing laws, and without reference to them; hence any maximum limit in existing special laws is immaterial. The power granted to raise by taxation the extra or additional amount is unqualified.

Again, it is urged that, because the maximum limitation of taxation for school purposes in the several charters of the cities is not the same, the operation of the law is not uniform, and its effect is to preserve and perpetuate the evil. How can this be so? The existing differences in the provisions of the respective charters of the cities, resulting in a lack of uniformity, existed before the law in question was enacted. It did not create, nor does it perpetuate, such want of uniformity. If the law be repealed or held to be invalid, the supposed evil of diverse charter provisions continues.

It is also urged that the law is unconstitutional because it necessarily adopts and extends existing special legislation, and that the law cannot be executed without recourse to the diverse provisions of the several city charters. This is the serious and doubtful question in this case, but the doubt must be solved in favor of the act, and, if it is fairly susceptible of two constructions, the one must be adopted which will sustain it. The act here in question may be fairly construed as complete in itself. It is an independent and separate grant of power, and it provides, by necessary implication,

for the execution of the power. True, it does not in terms designate the officers who are to execute the power, or the mode thereof, but the grant by implication carries with it everything necessary to make it effective, or, as the district court aptly expressed it, "the power to raise by taxation includes the power to levy the tax."

It is suggested, in effect, by the majority of the court, that the act adopts the diverse provisions of the existing special legislation contained in the charters of the cities, for the purpose of carrying the grant of power into effect; that is, it was the intention of the legislature to adopt an abortive method of executing the power, although some five years had then elapsed since the decision of the case of *Alexander v. City of Duluth*, 57 Minn. 47, 58 N. W. 866, in which it was expressly declared that the adoption of such a method was unconstitutional. I am unwilling to impute to the lawmaking power such fatuity from the mere fact that the law is silent as to how and by whom the grant is to be executed. It must be assumed that the legislature intended that the law should be executed in a way that would make its provisions valid, not invalid, and I see no practical difficulty in executing the power granted without invoking the aid of special and diverse charter provisions.

The constitutional amendment forbidding special legislation as to cities recognizes a continuance of their corporate existence under special charters for a limited time, at least, and expressly authorizes the passage of general laws with reference to them, provided such laws are uniform in their operation. Any general law enacted pursuant to such express provisions of the constitution must of necessity recognize the corporate existence of such cities, although they were created and continue to exist by virtue of special and diverse charters. Such a law would not be unconstitutional because it by implication adopted so much of the special charters as gave and continued to such cities their corporate existence. Now, the act in question does not go beyond this. It recognizes the cities as municipal corporations, and confers upon them, as such, the power to levy this tax. The execution of this power, in the absence of any express provision in the act, devolves upon the representative body of the corporation,—the common council,—no matter what officer or board may be authorized by their charters to levy

taxes for school purposes. The council must determine the amount to be raised under the act (that is, levy the tax), and certify its action, or cause it to be done by its recording officer, to the county auditor, pursuant to G. S. 1894, § 1557, who must extend the tax. If such be the correct construction of this act, it is not based upon existing special laws, within the prohibition of the constitution, and does not require for its enforcement their aid, and therefore it is constitutional.

JOHN B. HOXSIE and Another v. R. H. KEMPTON.

October 25, 1899.

Nos. 11,759—(66).

Pleading—Defect of Parties—Assignment of Claim—Departure.

Two partners, as a certain named company, sued an individual, also as a designated company, for not furnishing merchandise as per a contract between them. Defendant, in his answer, denied generally the allegations of the complaint, except he admitted that the plaintiffs were partners, but alleged that the contract referred to in the complaint was entered into by and between one P. and plaintiffs, as partners in business as said named company, on the one part, and the defendant and one N., as parties of the second part, as the other company. Plaintiffs in their reply admitted these allegations of the answer, and sought to maintain their action by alleging an assignment from P. to them of the claim sued on, and that N. and the defendant had dissolved partnership, and that the latter had assumed and agreed to pay the firm debts. The trial court dismissed the action. *Held*, that the reply was a departure from the complaint, and that the trial court ruled correctly in dismissing the action.

Action begun before a justice of the peace in Ramsey county. From a judgment in favor of defendant, plaintiffs appealed to the municipal court of St. Paul, which on motion of defendant changed the place of trial to the district court for Renville county. The district court, Powers, J., made an order granting a motion for judgment on the pleadings dismissing the action; and from a judgment entered pursuant to the order, plaintiffs appealed. *Affirmed*.

R. A. Walsh, for appellants.

Somerville & Olsen, for respondent.

BUCK, J.

John B. Hoxsie and Carl Schallinger, partners as the Hutchinson Produce Company, commenced this action in a justice court in Ramsey county, Minnesota, against R. H. Kempton, doing business as the Morton Mercantile Company. The plaintiffs' complaint, for a cause of action, alleged that they paid to the defendant the sum of \$70, for which the defendant promised and agreed to furnish merchandise immediately thereafter, and deliver the same to plaintiffs, but that defendant failed to do so, although duly and often demanded, save to the extent of \$28. Amount claimed, \$42, and complaint verified.

Defendant entered a general denial, except he admitted that the plaintiffs were partners, and were engaged in business as the Hutchinson Produce Company. He further answered by alleging that the contract referred to in the complaint was entered into by and between one Max Piowaty and the plaintiffs, partners as the Hutchinson Produce Company, on the one part, and H. M. Noak and this defendant, as partners under the style of the Morton Mercantile Company. Defendant also denied that said alleged Hutchinson Produce Company ever paid to H. M. Noak and the defendant a greater sum than \$50, and alleged that they delivered goods to the Hutchinson Produce Company to the amount of \$28, and further alleged that the payment of \$50 was earnest money for the sale of all wool, butter, and eggs which Noak and the defendant should have in their possession one week from the date of the payment, and that Noak and the defendant were at all times ready to perform said contract, but that the Hutchinson Produce Company refused to complete said purchase and pay for said articles, which amounted to \$647.90, to the damage to said Noak and defendant in the sum of \$75.

Plaintiffs replied, admitting that the contract was made by them and Piowaty, as partners, with the defendant and Noak, as partners, but alleging that the claim had been assigned to them (that is, that they had bought Piowaty's interest), and that defendant

and Noak had dissolved partnership, and that defendant had assumed and agreed to pay all the firm debts. All the pleadings were oral.

The action was tried in justice court, and judgment rendered in favor of defendant. Plaintiffs appealed therefrom to the municipal court of the city of St. Paul, upon both questions of law and fact. Upon defendant's application the action was thereupon transferred to the district court in and for Renville county, Minnesota, being the county where defendant resides. The action came on for trial in said district court on November 23, 1898, when, upon motion of defendant, the court ordered that judgment be entered in defendant's favor upon the pleadings, dismissing the action. This appeal is from the judgment entered thereon.

The motion for judgment on the pleadings was made on the ground that the complaint failed to state a cause of action, and on the further ground that, if any cause of action was stated in the complaint, the answer stated a good defense thereto, which was expressly admitted by the reply.

As already stated, the action is brought by Hoxsie and Schallinger, as co-partners, against R. H. Kempton alone; and the complaint alleges a payment by these two plaintiffs to Kempton of \$70, for which Kempton agreed to furnish merchandise, and he having failed to do so, except \$28, demands repayment of the balance. But the answer alleges that this agreement and payment were by one Piowaty, Hoxsie, and Schallinger, who were then partners in business, to one Noak and Kempton, as partners, thus setting up a defect of parties, both plaintiffs and defendants; and plaintiffs' reply admits the facts, but attempts to avoid the legal effect thereof by alleging that the claim sued upon was assigned to them, and that Noak and defendant were partners as the Morton Mercantile Company. So far as the reply attempts to allege an assignment or transfer of the claim, and that Kempton had assumed the firm debts, it is clearly a departure from the allegations of the complaint. Even if the plaintiffs alleged a good cause of action in the complaint, they voluntarily admitted in the reply that there was a defect of parties plaintiff; that is, they quit the allegation that Hoxsie and Schallinger were the plaintiffs at the time of the con-

tract sued upon, and alleged that Piowaty was then a partner with them. This was such a departure that evidence of the fact that Hoxsie and Schallinger were partners in interest as plaintiffs under the name of Hutchinson Produce Company could not have been admitted.

The same reasoning applies to plaintiffs' admission in the reply that the agreement was made with, and payment of the money made to, defendant Kempton and Noak, partners as the Morton Mercantile Company, and that Kempton assumed and agreed to pay the firm debts and transactions. There is a departure when a party quits or departs from the case or defense which he first made, and has recourse to another. *Trainor v. Worman*, 34 Minn. 237, 25 N. W. 401. And this departure appeared on the face of the pleadings; that is, it there appeared, by plaintiffs' own statement and admissions, that three persons made the contract sued upon, instead of the two persons named as plaintiffs, and that two persons were parties to the contract, instead of the one defendant sued herein. The fault seems to have been with the plaintiffs, and the court ruled correctly when it dismissed the action. There was no abuse of discretion or error in the court's refusal to permit the plaintiffs to amend their pleadings.

Judgment affirmed.

MARY A. EMERY v. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

October 25, 1899.

Nos. 11,762—(31).

Personal Injury—Judgment notwithstanding Verdict—Evidence.

Evidence considered, and *held* sufficient to justify the trial court in granting a motion for a judgment in favor of the defendant against the plaintiff, notwithstanding the verdict.

Action in the district court for Rice county to recover \$10,000 for personal injuries. The case was tried before Buckham, J., and a

jury, which rendered a verdict in favor of plaintiff for \$2,500. The court granted a motion for judgment in favor of defendant notwithstanding the verdict; and from a judgment entered pursuant to the order, plaintiff appealed. Affirmed.

F. E. Latham and Thos. H. Quinn, for appellant.

W. H. Norris and F. W. Root, for respondent.

BUCK, J.

The plaintiff brought this action to recover for personal injuries alleged to have been sustained by her by reason of the defendant's negligence in not having kept its platform well lighted at its depot at the village of Dundas, in this state.

The railroad at this place runs north and south. The depot building is situate upon the east side of the track. There is a platform extending along the west side of the depot, and extending north and south of it the whole length thereof, being 273 feet long and 8 feet wide. The portion of the platform directly west of the depot is 90 feet, and from the north end of the depot to the north end of the platform is 120 feet, at which point the platform is 23 inches above the ground, and here are located three steps, which run the full width of the platform, and this is the usual passageway for passengers going from the north to the depot and coming north therefrom. Upon this platform, between the north end of the depot and the north end of the platform, there is a stationary lamp post, with lamp, 10 feet from the corner of the depot, but it was not lighted at the time in question.

The plaintiff went to this depot on the night of the evening of January 11, 1898, with a relative, who intended to and did take passage on defendant's train. When plaintiff went to the train it was just getting dark, and she remained in the waiting room about 25 minutes. This room was lighted. After her relative got upon the train, plaintiff waited until the train pulled out, and she then started for her home, some three blocks away, over this platform, going north until she arrived at the north end thereof, when, instead of going down the steps at the end of the platform, she stepped off over these steps, and fell upon the ground, whereby she received the injuries complained of herein. Upon the trial she re-

ceived a verdict for \$2,500, and upon a settled case the trial court, upon motion, ordered a judgment in favor of the defendant, and against the plaintiff, notwithstanding the verdict, and plaintiff appeals.

The defendant offered no evidence upon the trial except such as was drawn out by it on cross-examination, and practically there was no controverted evidence in the case. The plaintiff had been a resident of the village of Dundas since 1884, living about three blocks from the depot, and she testified that she had been upon the platform a good many times, both in the daytime and evening, and had been there often enough to know the platform and steps and all about them; that the north end of the platform, when she went there that evening, was not any different from what it had been when she was there before; that she was not in any hurry to get home, and was not afraid to be out at night. She was a woman 53 years of age, and had good eyesight. It did not appear that there was anything unusual to divert her attention, or anything exceptional in the character of the place of the injury or near there by which she was misled. She was familiar with the location and situation of the steps and north end of the platform, and in fact with the entire platform, and hence must have known the danger of walking off the north end of it in the darkness; for she testifies that it was the darkest night she ever knew. If so, the danger was proportionate to the darkness; but she made not the slightest effort to avoid danger, and secure her safety, for she testifies that she walked right along, and walked right off the end of the platform, and was thereby injured.

Now, one who was so familiar with the platform and its length ought to have known, and naturally would have known, when she arrived at or near the steps or end of the platform, and made some effort to have ascertained where they were; but this she did not do, and did not slacken her speed at all. Her sister-in-law got upon the cars about opposite the ticket office, and we assume that it was from that point that she started for her home, and, as she did so, went the same route as she came, as she says that she was the best acquainted with, and for many years knew, that route. She testifies that she intended to go to

the north end of the platform, and down the steps there located. Thus, she then had in mind the end of the platform and the steps, for they were the very point which she was aiming to reach. She further testifies that between the point where she left her sister-in-law and the north end of the platform there was a light; that there was a light near the depot, but whether it came from the depot, or from the lamp near the depot being lit, she could not say, although she says she could not see the floor or side of the platform. There was no defect in the platform or steps, and there is not a whit of evidence to show that she used any care or caution to avoid the danger of which she then knew; having known the situation for many years.

Thus far we have considered the case upon the plaintiff's own testimony, but her own witness, Moore, testified as follows:

"The platform at its north end was pretty dark. * * * It was dark enough for me to get along, I noticed. I couldn't say just exactly how dark. I could notice just a low glimmer of light through the window of the depot; just enough to show me as I was going along on the walk; just a slight light." Upon cross-examination he testified: "Q. And do you say, Mr. Moore, that it was light enough, from whatever source it came, so that you could and did determine when you arrived at the end of the platform? A. Well, I would know, certainly. I would know when I came to it. I would naturally throw out my foot, if it was so— Q. Did you have any difficulty in determining that you had reached the end of that platform? A. No, sir; not at all. Q. Was there any difficulty in seeing that you had reached the end of the platform, to you? A. No; I don't know as I could say that there was." Q. "Was there sufficient light to enable a person using ordinary care to see when he or she reached the end of that platform? A. Well, any one that was acquainted with the platform— Q. And using ordinary care? A. Using care, certainly would know when they came to it. Q. And could safely alight from that platform? A. I should judge so; yes. * * * Q. Was there any difficulty to a person, having good eyesight, and being familiar with that platform, knowing when he or she had reached the end of the platform? A. I think not."

We regard her acts not only negligent, but little short of reckless. It was her duty to use reasonable care in going to the end of the platform, and in finding the end thereof and the location of the steps, and take reasonable precautions to avoid stepping off the

platform over the steps upon the ground, and in not doing so she was guilty of such negligence as bars her recovery, whether the defendant was guilty of negligence in not keeping the platform properly lighted.

Judgment affirmed.

CANTY, J.

I concur in the result, on the ground that, in my opinion, the defendant was not guilty of negligence in maintaining its depot platform in the condition it was when plaintiff was injured.

CHARLES F. LELAND and Another v. SCHOOL DISTRICT NO. 28 OF ST. LOUIS COUNTY.

77	489
479	18

October 25, 1899.

Nos. 11,787—(140).

School District—Oral Contract with Teacher.

An oral contract made by a school teacher with the board of trustees of a school district to teach school is invalid, and no recovery can be had for services performed thereunder, in an action upon quantum meruit.

Action in the municipal court of Duluth to recover \$60 for services performed by plaintiffs' assignor as teacher in defendant school district. The case was tried before Edson, J., who found in favor of plaintiffs; and from a judgment entered pursuant to the findings, defendant appealed. Reversed.

John Jenswold, Jr., for appellant.

Windom & McMahon, for respondents.

BUCK, J.

One Mae D. Greer, a qualified and duly-licensed school teacher, taught school in the above-named school district (No. 28), in St. Louis county, in this state, for a period of six months, commencing November 11, 1897, at the rate of \$40 per month, for which the district paid her for four months' services, leaving the balance of \$60, for one month and one-half, unpaid, which amount she assigned to these plaintiffs, who bring this suit for the recovery thereof upon

quantum meruit. There was no written contract made between the teacher and the board of trustees of the district, as required by G. S. 1894, § 3694, which provides that the

“Board of trustees, at a meeting called for that purpose, shall hire, for and in the name of the district, such teachers only as have certificates of qualification, and make written contracts with such teachers, specifying the wages per month and time employed, as agreed upon by the parties, and file such contracts in the office of the clerk.”

After Miss Greer had taught the full term of six months, the school director and clerk issued to her an order on the treasurer for the balance of \$60, and she assigned the order to the plaintiffs, for value, before the commencement of this action, and no part has been paid; and the school district refuses to pay the same upon the ground that she did not teach in said school district under a written contract, as provided by law. This is the principal question involved in this action.

In *McGuinness v. School Dist. No. 10*, 39 Minn. 499, 41 N. W. 103, it was held that a contract between a teacher and the trustees of a school district must, under the statute above quoted, be in writing, and signed by the teacher and a majority of the trustees, and must state the wages of the teacher per month, and the time employed, and that these requirements were essential to the validity of the contract. But the question of whether the school district could waive the statutory provision requiring such contracts to be in writing, and orally employ a teacher, who, when she had thereunder performed the services, could maintain an action upon quantum meruit, was not passed upon. We think such statutory provisions are mandatory, and that an oral contract made between such parties and for such purposes is invalid. 1 Beach, Pub. Corp. § 253.

Where a statute provides that all the contracts of a municipal corporation shall be in writing, this restriction must be observed, or the contract will be considered invalid. 15 Am. & Eng. Enc. 1084. This provision of the statute is one resting in a sound public policy, and a school teacher and the trustees of a school district cannot waive the restrictions and limitations found in the law. In

this state there are several thousand school districts, and to permit them to make oral contracts for teaching, the terms and conditions of which must necessarily rest in the memory of the trustees and teachers, might lead to innumerable disputes and litigation, to the great injury of the educational interests, if not frequently to the financial interests, of the districts and the state.

This case well illustrates what the people and trustees of a school district may sometimes do when instigated by a selfish interest, viz., repudiate an honest though invalid claim, although it had the benefit of the services of a faithful and competent teacher, and had used her services as the basis for obtaining their share of the state apportionment of the school money. Hence it is important for both teacher and trustees that the mandatory provisions be followed; that the wages per month and time employed as agreed upon be reduced to writing, and thus made definite and certain, and filed in the clerk's office, where the same will be open to inspection by all interested persons. And it is a wise rule that requires such a contract to be reduced to writing, and does not permit the officers of a municipal corporation to waive its execution. The right of waiver is subject to the control of public policy, which cannot be set aside or contravened by any arrangement or agreement between the parties, however expressed. 28 Am. & Eng. Enc. 533.

We therefore hold that an oral contract made by a school teacher with the board of trustees of a school district to teach school is invalid, and no recovery can be had for services performed thereunder, in an action upon quantum meruit.

Judgment reversed.

JOSEPHINE H. DAVIS and Others v. EDWARD CARLIN and Others.

October 25, 1899.

Nos. 11,894—(90).

Tax Certificate—Failure to Give Highest Bid for Each Lot.

Held, that the certificate of tax sale does not show that the price for which each lot was sold was the highest sum bid for the same in severalty, and hence the certificate is invalid.

Action in the district court for Pine county to have certain tax certificates and tax deeds adjudged null and void and to remove a cloud. The case was tried before Crosby, J., who found in favor of plaintiffs; and from a judgment entered pursuant to the findings, defendant Sellers appealed. Affirmed.

Clapp & Macartney, for appellant.

S. & O. Kipp, for respondents.

BUCK, J.

This action was brought to test the validity of a tax certificate of sale of land, and the sole question is as to the certificate being valid upon its face. The certificate, in part, is as follows:

“State of Minnesota }
County of Pine, } ss.

“I, Fred A. Hodge, auditor of Pine county, do hereby certify that at the sale of the forfeited lands, pursuant to real-estate tax judgment entered in the district court in the counties of Pine and Kanabec, on the 8th day of August, 1881, in proceedings to enforce payment of taxes upon real estate delinquent in the year 1879, and for prior years, for the county of Pine, which sale was held at the county auditor's office, in said county of Pine, on the 22d day of September, 1881, the following described pieces or parcels of land, situate in the said county of Pine, state of Minnesota, to-wit: [Here the certificate describes six pieces of land sold, and the price each piece was sold for;] was offered for sale to the highest bidder, and at the said sale I did sell the said pieces or parcels of land severally to John W. Sellers for the sums above stated, amounting, in the aggregate, to the sum of \$27, that being the highest sum bid therefor; and, he having paid said sum, I do therefore, in consideration thereof, and pursuant to the statute in such case made and pro-

vided, convey the said pieces or parcels of land, in fee simple, to the said John W. Sellers, his heirs and assigns forever.

"Witness my hand and official seal this first day of October, 1881.

Fred A. Hodge, (Seal.)
County Auditor."

The trial court held that this tax certificate was void on its face, and hence that the defendant Sellers, who claimed title to the land under and by virtue of it, had no right thereto or title to said premises. The ground of its decision was that the certificate does not show that the price for which each tract was sold was the highest sum bid for the same in severalty, although it shows the highest sum bid for all the lands described in the certificate in the aggregate. We think that the trial court held correctly.

The certificate was made under Laws 1881, c. 135, which provides the form of the certificate, and requires it to state, not only that the land was offered for sale to the highest bidder, but that it was sold for the highest sum bid therefor. Under this law, there was no redemption from such sale, and the certificate passed to the purchaser the estate therein described, without any other act or deed whatever. Under such circumstances, there should be a strict compliance with the law, in order that there might be a full and complete protection to the landowner. The sum of \$27 might have been, in the aggregate, the highest sum bid for the six pieces sold, and yet the certificate fails to show the highest sum bid for the plaintiffs' separate lots, or the highest sum for which each of said lots was sold. Hence the certificate was insufficient and invalid.

Judgment affirmed.

START, C. J.

I dissent.

ANSEL R. DOTEN v. AETNA INSURANCE COMPANY OF HARTFORD.

October 26, 1899.

Nos. 11,570—(7).

Fire Insurance—Laws 1895, c. 175, § 53.

The clause in Laws 1895, c. 175, § 53 (the insurance law of this state), which provides that, if the insured premises "shall become vacant by the removal of the owner or occupant and so remain vacant for more than thirty days without such assent" of the insurer, the policy shall be void, is not affected, qualified, or modified by the clause in section 25 which provides that in the absence of any change increasing the risk without the consent of the insurer, and in the absence of intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal upon which the insurer receives a premium shall be paid.

Same—Insured Premises Vacant without Consent of Insurer.

Therefore an answer in an action brought upon such a policy in which it is alleged that the insured premises (a dwelling house) became vacant by the removal of the insured, were vacant when destroyed by fire, and had been so vacant for more than 30 days prior thereto, without the assent of the insurer, states a good defense. It is not necessary to further allege that the change in condition increased the risk.

Action in the district court for Hennepin county to recover \$2,500 on a fire insurance policy. From an order, Simpson, J., sustaining a demurrer to the answer, defendant appealed. Reversed.

Kitchel, Cohen & Shaw, for appellant.

The parts of Laws 1895, c. 175, § 25, directing the amount to be paid in case of total or partial loss must be construed in connection with the standard policy provisions of the same act as a valued policy law in respect to buildings totally destroyed. Every part of the statute must be considered in connection with the whole, so as to give effect to every part. *Stevens v. City of Minneapolis*, 29 Minn. 219; *Endlich*, Interp. St. §§ 23, 35, 40; *McNamara v. Minnesota Central Ry. Co.*, 12 Minn. 269 (388). If there be irreconcilable repugnancy between section 25 and section 53, the earlier section is inoperative. This is the ancient rule. *Case of Woods*, 1 Coke, 40b,

47a; Federalist, No. 78; Packer v. Sunbury, 19 Pa. St. 211; Brown v. County, 21 Pa. St. 37; Harrington v. Trustees, 10 Wend. 547; Gibbons v. Brittenum, 56 Miss. 232; State v. Heidorn, 74 Mo. 410; Branagan v. Dulaney, 8 Colo. 408; Albertson v. State, 9 Neb. 429; Ex parte Hewlett, 22 Nev. 333; Sedgwick, St. L. 104; Potter's Dwaris, St. 156; Endlich, Interp. St. § 183; Sutherland, St. Const. § 220. A second rule is given, that the conflict being irreconcilable, both clauses are void. Sutherland, St. Const. § 220. But for this rule there is no decision. A third rule is, that preference should be given to that section which harmonizes with other laws and the justice of the case. Bishop, Written Law, § 64; Farmers v. Hale, 59 N. Y. 53; Kansas v. Commissioners, 16 Kan. 587; Sams v. King, 18 Fla. 557. Whichever alternative is chosen, section 25 must be rejected. The Ohio decisions do not control and are not even persuasive. The rule that adopts the settled construction of a law taken from another state is not to be followed under all circumstances. Whitney v. Fox, 166 U. S. 637; In re St. Paul & N. P. Ry. Co., 37 Minn. 164; Nicollet Nat. Bank v. City Bank, 38 Minn. 85.

Cobb & Wheelwright, for respondent.

The purpose of the insurance act of 1895 is threefold: (1) To impose on the insurer the obligation of examining the property in advance of issue of the policy, with a view to determining its insurable value and fixing its amount in the policy, which amount is made conclusive on all parties in case of loss. (2) To exclude as a defense to an action on the policy any change in the ownership or physical condition of the premises, in the absence of increase of risk or intentional fraud of the insured. (3) To place the burden of proof, in the absence of fraud, on the insurer to show that the change of ownership or condition increased the risk. The portion of section 25 under consideration is a literal transcript of an Ohio statute (See R. S. Oh. §§ 2643, 2644), which has been construed by the courts of that state. Insurance v. Leslie, 47 Oh. St. 409; Moody v. Insurance, 52 Oh. St. 12; Sun v. Clark, 53 Oh. St. 414; Webster v. Dwelling, 53 Oh. St. 558. See also Cannell v. Phoenix, 59 Me. 582; Thayer v. Providence, 70 Me. 531; Lancy v. Home, 82 Me. 492; White v. Phoenix, 83 Me. 279; Chamberlain v. New Hampshire, 55 N. H.

249; *Pennsylvania Mut. L. Ins. Co. v. Mechanics Savings Bank & T. Co.*, 72 Fed. 413, 418.

COLLINS, J.

This is an action upon a policy of insurance by the terms of which defendant insured plaintiff against loss or damage by fire, to the amount of \$2,500, on a dwelling house. It is alleged in the complaint that the insured premises were totally destroyed by fire on July 16, 1898, and this allegation, together with all others in the complaint, is admitted by the answer. Vacancy of the insured premises at the time of the fire, and for more than 90 days prior thereto, contrary, as it is claimed, to the terms of the policy, is alleged by way of defense. Counsel for plaintiff interposed a general demurrer to the answer, the precise point being that it failed to allege that the vacancy increased the risk, or that the insured was at any time or in any manner guilty of any intentional fraud. The demurrer was sustained in the court below.

A determination of defendant's appeal calls for a construction of certain provisions found in Laws 1895, c. 175,—an act to revise and codify the insurance laws of this state. That the provisions in question are difficult to bring into harmony will be apparent as we proceed. To sustain their position, plaintiff's counsel rely upon portions of section 25. This section requires of the insurer an examination of any building to be insured, a full description to be made, the insurable value to be fixed, and the amount of this value to be stated in the policy. Then follows this clause:

"In the absence of any change increasing the risk, without the consent of the insurer, and in the absence of intentional fraud on the part of the insured, in case of total loss the whole amount mentioned in the policy or renewal upon which the insurer receives a premium shall be paid."

Following this language are provisions relating to payment in case of a partial loss, or payment where there are two or more policies upon the same property; and it is then provided that,

"In the absence of fraud, the burden of proof to show an increase of risk by reason of any change in the ownership or condition of the structure or building upon which insurance is effected, either before

or after loss arises, shall be upon the insurer; anything in the application or the policy of insurance to the contrary notwithstanding."

It is argued that, because of the first above quoted portions of section 25, it was incumbent upon defendant to allege and prove that the risk which it had assumed was increased by reason of the house becoming vacant subsequent to the issuance of the policy.

With the exception of the proviso last above quoted, those portions of section 25 relied upon by plaintiff's counsel seem to have been taken from an Ohio statute (Act March 5, 1879). This act consisted of but two sections, and the one now under consideration had been construed by the supreme court of that state prior to its adoption by the legislature of this state. *Insurance v. Leslie*, 47 Oh. St. 409, 24 N. E. 1072; *Moody v. Insurance*, 52 Oh. St. 12, 38 N. E. 1011. Afterwards it was before the Ohio court in two cases. *Sun v. Clark*, 53 Oh. St. 414, 42 N. E. 248; *Webster v. Dwelling*, 53 Oh. St. 558, 42 N. E. 546. Of these Ohio cases, that of *Moody v. Insurance Co.* is probably most in point, as sustaining the contention of plaintiff's counsel; and, if the well-known rule as to a settled construction of an adopted law were applicable here, we would feel obliged to hold the demurrer well taken. But the fact is that there are other parts of chapter 175 which must also be construed in connection with the clause found in section 25. When the *Moody* case was decided, and when the language under consideration was borrowed, various provisions of that enactment, as the same are prescribed in section 53, were no part of the insurance law of the state of Ohio. The greater portion of chapter 175 was original legislation, and therefore a settled construction of any one clause which happened to be adopted from a sister state cannot be allowed to wholly control. If it were, the general rules which govern when construing a statute as a whole would be disregarded and ignored.

It must be admitted that the intention of the lawmakers when enacting chapter 175 was to provide a uniform contract to be used by all fire insurance companies engaged in business within our state,—a contract which in some particulars could not be departed from or evaded even by the concurrence of the parties thereto. The principal feature seems to have been what is known as the

"valuation clause"; thus imposing upon the insurer the obligation to examine the property in advance, to fix the insurable value, and, in case of the total destruction of a building, to abide by the fixed value when settling the amount of the loss. This appears from the law itself,—more particularly in section 53, in which it is provided that the standard form shall be plainly printed in type no smaller than long primer "and shall be as follows, to wit"; the form then being given in full. It is also declared in the same section that no company

"Shall issue fire insurance policies on property in this state other than those of the standard form herein set forth."

Among the clauses found in this prescribed form are the following, which, standing alone, would seem to be very clear and intelligible:

"The policy shall be void if any material fact or circumstance stated in writing has not been fairly represented by the insured, or if the assured now has or shall hereafter make any other insurance on the said property without the assent of the company, or if, without such assent the said property shall be removed, except that, if such removal shall be necessary for the preservation of the property from fire, this policy shall be valid without such assent for five days thereafter, *or if, without such assent, the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency or consent of the insured, be so altered as to cause an increase of such risks, or if, without such assent, the property shall be sold or this policy assigned, or if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than 30 days without such assent,* or if it be a manufacturing establishment, running in whole or in part extra time, except that such establishment may run in whole or in part extra hours not later than nine o'clock p. m., or if such establishment shall cease operation for more than 30 days without permission in writing endorsed thereon, or if the insured shall make any attempt to defraud the company, either before or after the loss, or if gunpowder or other articles subject to legal restriction shall be kept in quantities or manner different from those allowed or prescribed by law, or if camphene, benzine, naphtha or other chemical oils or burning fluids shall be kept or issued by the insured on the premises insured, except that what is known as refined petroleum, kerosene or coal oil, may be used for lighting, and in dwelling houses kerosene oil stoves may be used for domestic purposes, to be filled when cold, by daylight, and with oil of lawful fire test only."

We have italicised a part of these provisions, that special attention may be drawn to the language used; and it is the claim of defendant's counsel that as the insurer shows the building to have been occupied when insured, to have been vacated thereafter, and to have been vacant and unoccupied at the time of its total destruction by fire and for more than 100 consecutive days immediately prior thereto, with the assent of the insured, but without the assent of the insurer, the policy itself became void, in accordance with its express and authorized terms, and without regard to whether or not the risk, as originally assumed, had been increased by the change of conditions. Stated concisely, the claim of plaintiff's counsel, in opposition, is that the limitation and language relating to the absence of any change increasing the risk, found in section 25, should be read into section 53, and into all policies issued in accordance with the form fixed thereby. The question is, can the entire act be so construed, having in mind that it is a remedial statute, to be construed liberally for the suppression of the mischief and the advancement of the remedy? The question is a difficult one, as before stated, and the conclusion reached not wholly free from doubt; but, after careful examination of the entire act, we have concluded that the order of the court below must be reversed.

Evidently the clause in section 25 which we are asked to incorporate into the standard form of policy is incomplete and open to criticism. It merely provides that in the absence of any change increasing the risk, to which change the insurer has not assented, the amount fixed in the policy shall be paid in case of a total loss. It is not expressly so stated, but the inference is that, if there has been a change which has increased the risk, the amount of the loss is to be ascertained as is the amount in case of partial loss. Does this mean that, if the change is one for which the insured is not responsible, the fixed valuation is not to govern? This seems to be the view of counsel for both parties, but we are not required to determine that question in the present case. It is to be noticed, however, that a part of the italicised quotation from section 53 also refers to changes in the situation or circumstances which cause an increase in the risk. Construing these words strictly and by them-

selves a policy is wholly invalidated if this change occurs by or with the knowledge, advice, agency, or consent of the insured, and without the assent of the insurer. So we find two distinct provisions in the law in respect to a change of condition or situation, which change increases the risk. In the one case, and under the provision found in section 25, the penalty, in case of such a change, is to deprive the insured of the benefit of that portion of the policy which fixes the amount of the loss, if total, while in the other, and in accordance with the form of policy prescribed in section 53, the penalty is much more drastic, for the protection is entirely swept away.

It may be impossible, when we consider the remedial character of the act of 1895, to construe either of these provisions exactly as they are written; but, as we look at the entire act, it is not necessary to place a construction upon the language found in section 25. It is of doubtful meaning when taken in connection with various other provisions found in the law, and there are other provisions equally as ambiguous,—for instance, section 20. But by the express and emphatic language found in section 53 the only policy to be issued is that plainly prescribed, in form not to be misunderstood. Every person reading the language there used will understand that the policy is to be void for stated reasons, and when certain conditions exist. It is to be void if the insured premises are vacated by the removal of the owner or occupant, and the vacancy continues for more than 30 days, without the assent of the insurer. There is no obscurity in the wording. No one could be misled by it, and its enforcement as a part of the contract will work no hardship; for the insured has notice if it, and may easily protect himself against loss. We assert that if an ordinary layman should first read the insurance law, and then read a standard-form insurance policy, he would say, without the slightest hesitation, that the policy became void upon the removal of an owner or occupant from an insured building, and a continuous vacancy for a period exceeding 30 days.

We are not authorized to amend, by construction or otherwise, so distinct a provision of the law as is that which declares the policy void in the event of a removal and a continued vacancy. The policy is also to be void for other stated reasons, and if the provision found

in section 25 is to be read into it, under any conditions, there would be no point at which we could halt and say that it had no application. Other insurance would not avoid the policy, if there was no increase of risk. The keeping of gunpowder, dynamite, nitroglycerine, or other highly dangerous articles on the premises would not render the policy void, nor would it prevent recovery in case of loss, if such keeping did not increase the risk. And, according to the views of plaintiff's counsel, there would be no increase of risk unless it conduced to the loss in a direct manner. If the fire originated elsewhere, and the insured building was destroyed as a result, and not because of any change of its condition, the policy would still be valid. Every one of the conditions prescribed in section 53 to be incorporated into the policy would be swept away. All might exist, but the policy would still be valid; its validity not being determined as a question of law from plain and unambiguous language, but wholly as a question of fact, after section 53 and the policy itself are supplemented with a clause from section 25 which, to put it mildly, is of doubtful meaning.

Whatever may be said of other parts of the 1895 act, it seems clear to us that the provisions which prescribe what the form of a standard policy shall be, and exactly what it shall contain, and under what circumstances it shall become void, received very careful and considerate attention at the hands of the legislators. These provisions we cannot wipe out by a forced and unnatural construction of a phrase of doubtful import found in another part of the act. We therefore hold that the clause in section 53 which provides that, if the insured premises "shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent" of the insurer, the policy shall be void, is not affected, qualified, or modified by the clause in section 25 which provides that, in the absence of any change increasing the risk without the consent of the insurer, the whole amount mentioned in the policy or renewal upon which the insurer receives a premium shall be paid in case of a total loss.

The defense as set forth in the answer was sufficiently pleaded, and the order sustaining plaintiff's demurrer is reversed.

MITCHELL, J.

I concur in the result, without committing myself to any theory as to the construction or application of section 25, except the single proposition that the expression, "increasing the risk," found in that section, cannot be read into section 53 so as to add to, take from, limit, or qualify its positive and unconditional provisions as to what the standard policy may or may not contain, or as to what shall or shall not avoid the policy.

I think that, when section 53 provides that a policy shall be void if the insured premises "shall become vacant by the removal of the owner or occupant and so remain vacant for more than 30 days without such assent" of the insured, it means just what it says, and that there is no permissible rule of construction under which we can add to or read into this the words "provided such vacancy increases the risk." As suggested in the opinion, if we read this into the provision as to vacancy, we would have to read it into every other analogous provision of section 53. I do not see that the cases cited by plaintiff are authority for any general principle or proposition, except the self-evident one that, if provisions are incorporated into a policy which are in conflict with the statute on the same subject, such provisions are void, and the statute applies. The statute which the supreme court of Ohio construed in the cases relied on by the plaintiff consisted exclusively of what is now section 25 of our statute. But our statute contains in section 53 an express and specific provision as to the effect of vacancy upon the policy. I may add that in my judgment there is no ground for claiming that the expressions "changing the risk" or "increasing the risk" are synonymous with "causing or contributing to the loss," and the Ohio cases lend no support to any such claim. The two expressions are used in entirely different senses in insurance law and insurance contracts.

STATE ex rel. JOSEPH H. BEEK v. JOHN WAGENER.¹

October 26, 1899.

Nos. 11,734—(14).

77 483
77 491**Laws 1899, c. 225, Constitutional.**

Laws 1899, c. 225, "An act to license and regulate and define business of commission merchants or persons selling agricultural products and farm produce on commission," etc., *held* constitutional. It is not in conflict with the provisions of the fourteenth amendment to the federal constitution. Nor does it conflict with any of the provisions of section 8 of article 1 of said constitution. Nor are any of its provisions in conflict with sections 2 or 7 of article 1 of the state constitution. Nor is it unconstitutional on the ground that legislative powers have therein been delegated to the railroad and warehouse commission of this state.

Same—Sale of Farm Products on Commission.

The peculiar characteristics of agricultural products and farm produce, and the liability to peculiar abuses resulting from a sale thereof on com-

¹ STATE ex rel. WILLIAM B. MOHLER v. PHIL T. MEGAARDEN.

October 26, 1899.

Nos. 11,739—(28).

Writ of habeas corpus issued by the district court for Hennepin county to respondent sheriff of said county commanding him to have the body of relator before said court, together with the cause of his detention. Respondent justified under a warrant of arrest issued by the municipal court of Minneapolis, on complaint that relator had violated the provisions of Laws 1899, c. 225, by selling grain on commission and carrying on the business of a commission merchant without having obtained a license or given a bond. From an order, Elliott, J., discharging the writ and remanding relator to the custody of respondent, relator appealed. Affirmed.

Wilson & Van Derlip, for appellant.

W. B. Douglas, Attorney General, and *Childs, Edgerton & Wickwire*, for respondent.

PER CURIAM.

The questions in this case are disposed of in *State v. Wagener*. It is therefore ordered that final judgment be entered in this court discharging the writ of habeas corpus and remanding the relator to the custody of the sheriff of Hennepin county for further proceedings.

mission, are such as to suggest the practical necessity for distinctive legislation on the subject, different from what would be expedient or necessary in the case of other property sold on commission, and to justify the legislature, in its discretion, in putting those who sell them on commission in a class by themselves.

Same—Section 3 of Act.

Whether section 3 of said chapter is in conflict with certain provisions of the fourth or the fifth amendments to the federal constitution, or in conflict with provisions found in sections 7 and 10 of article 1 of the state constitution, is not decided, because the questions are not involved herein.

Writ of habeas corpus issued by the supreme court to respondent sheriff of Ramsey county commanding him to have the body of James B. Redpath before said court, together with the cause of his imprisonment or detention. Respondent justified under a warrant of arrest issued by the municipal court of St. Paul, on complaint of W. B. Douglas, charging said Redpath with having on June 17, 1899, at St. Paul, wrongfully and unlawfully engaged as a commission merchant in the business of receiving consignments of agricultural products, farm produce and fruits, to be sold by him on commission and for account of the consignors, and charging the receipt and sale of certain fruit by said Redpath, as such commission merchant. Writ discharged.

Palmer & Beek, for relator Beek.

Laws 1899, c. 225, conflicts with Const. (U. S.) amend. 14, § 1, and with Const. (Minn.) art. 1, § 2, in that it abridges the privileges and immunities of citizens of the United States. It conflicts with said fourteenth amendment and with Const. (Minn.) art. 1, § 7, in that it deprives certain persons of liberty and property without due process of law. It conflicts with said fourteenth amendment and with Const. (Minn.) art. 1, § 2, in that it denies to certain persons within the jurisdiction of the state the equal protection of the laws.

The act conflicts with Const. (U. S.) amend. 4, and Const. (Minn.) art. 1, § 10, in that it deprives certain persons of their right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; and with Const. (U. S.) amend. 5, and with Const. (Minn.) art. 1, § 7, in that it compels certain persons in

criminal cases to be witnesses against themselves. *Boyd v. U. S.*, 116 U. S. 616; *Entick v. Carrington*, 19 How. St. Tr. 1029; *Counselman v. Hitchcock*, 142 U. S. 547; *Bram v. U. S.*, 168 U. S. 532.

The act conflicts with Const. (U. S.) art. 1, § 8, in that it interferes with and attempts to regulate commerce between the state of Minnesota and other states. *State v. Donaldson*, 41 Minn. 74; *Henderson v. Mayor of the City of New York*, 92 U. S. 259; *Soon Hing v. Crowley*, 113 U. S. 703; *Mugler v. Kansas*, 123 U. S. 623; *Minnesota v. Barber*, 136 U. S. 313; *Leisy v. Hardin*, 135 U. S. 100; *In re Minor*, 69 Fed. 233.

The act exceeds the power conferred by the state constitution, in that it attempts to delegate powers vested solely and exclusively in the legislative body. *In re Wilson*, 32 Minn. 145, 146; *State v. Mayor of the City of St. Paul*, 34 Minn. 250; *Minneapolis Gas L. Co. v. City of Minneapolis*, 36 Minn. 159; *County Commrs. of Hennepin Co. v. Robinson*, 16 Minn. 340 (381); *Darling v. City of St. Paul*, 19 Minn. 336 (389); *State v. Young*, 29 Minn. 474; *State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281; *Anderson v. Manchester F. Assur. Co.*, 59 Minn. 182; *O'Neil v. American*, 166 Pa. St. 72; *Owensboro v. Todd*, 91 Ky. 175; *Ex parte Cox*, 63 Cal. 21; *Maxwell v. State*, 40 Md. 273, 274; *Yick Wo v. Hopkins*, 118 U. S. 356. See also 1 Kent, Com. 446; *Rice v. Foster*, 4 Harrington (Del.) 479; *Parker v. Com.*, 6 Pa. St. 507, 511.

Wilson & Van Derlip, for relator Mohler.

The act is not a tax law. *State v. Conlon*, 65 Conn. 478. If it were, it would conflict with Const. art. 9, § 1. *Kansas v. Grush*, 151 Mo. 128. It was intended to be a regulation of business in the exercise of the police power. The police power of the state has the right to protect the general welfare by subordinating to it the rights of the individual in respect to person and property. 2 Kent, Com. 340; *New Orleans Water-Works Co. v. St. Tammany Water-Works Co.*, 4 Woods, 134; *Stockton Laundry Case*, 26 Fed. 611; *New Orleans v. Hart*, 40 La. An. 474; *State v. Noyes*, 47 Me. 189, 211; *Com. v. Alger*, 7 Cush. 53; *People v. Jackson*, 9 Mich. 284; *Thorpe v. Rutland*, 27 Vt. 140; *Marmet v. State*, 45 Oh. St. 63; *State v. Gardner*, 58 Oh. St. 599; *State v. Searcy*, 20 Mo. 489; *Town v. Rose Hill*,

70 Ill. 191; Board v. Willamette, 6 Or. 219; Van Hook v. City, 70 Ala. 361; Justice v. Com., 81 Va. 209; In re Ah Fong, 3 Sawy. 144; Philadelphia v. Bowers, 4 Houst. (Del.) 506; Munn v. Illinois, 94 U. S. 113; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S. 557; Beer Co. v. Massachusetts, 97 U. S. 25; Mugler v. Kansas, 123 U. S. 623; Budd v. New York, 143 U. S. 517; New York & N. E. R. Co. v. Bristol, 151 U. S. 556; Holden v. Hardy, 169 U. S. 366; People v. Budd, 117 N. Y. 1; Chicago v. City, 97 Wis. 418; State v. Goodwill, 33 W. Va. 179; Rippe v. Becker, 56 Minn. 100, 112; State v. Chicago, M. & St. P. Ry. Co., 68 Minn. 381; State v. Wagener, 69 Minn. 206.

No law falls properly within the police power which does not have for its object the advancement of the public interest, the protection of a common public right, or does not operate on some public function or on property invested with a public interest. New Orleans Water-Works Co. v. St. Tammany Water-Works Co., supra; People v. Warden, 157 N. Y. 116; State v. Goodwill, supra; State v. Scougal, 3 S. D. 55; Wilkinson v. Leland, 2 Pet. 627; New Orleans G. L. Co. v. Louisiana L. Co., 115 U. S. 650; Ex parte Whitwell, 98 Cal. 73; Smiley v. MacDonald, 42 Neb. 5; Lawton v. Steele, 119 N. Y. 226; Allgeyer v. Louisiana, 165 U. S. 578; Cooley, Const. Lim. 710; State v. Donaldson, 41 Minn. 74; Potter's Dwarrior, St. 458; San Antonio v. Wilson (Tex. App.) 19 S. W. 912; People v. Budd, supra; Frorer v. People, 141 Ill. 171, note, 142 Ill. 387. As to what constitutes a public interest, see Cooley, Const. Lim. 736; Zanesville v. Gas-Light, 47 Oh. St. 1; State v. Scougal, supra; Millett v. People, 117 Ill. 294; State v. Goodwill, supra; People v. Budd, supra; Munn v. Illinois, supra; State v. Loomis, 115 Mo. 307; San Antonio v. Wilson, supra. It is the duty of the courts to declare any statute invalid which attempts to go farther than to legislate for the welfare of the public. State v. Donaldson, supra; People v. Warden, supra; Ex parte Whitwell, supra; Mugler v. Kansas, supra; Hennington v. Georgia, 163 U. S. 299.

The act contains no element of a public character, but is exclusively a private act for the benefit of consignors who entrust agricultural products or farm produce on commission for sale. It is the duty of the courts to go beneath the surface, and to get

at the real purpose of an act, in order to pass on its validity. *Morgan's Steamship Co. v. Louisiana Board of Health*, 118 U. S. 455; *People v. Warden*, supra; *Nichols v. Walter*, 37 Minn. 264. The dictum of the legislature cannot invest a business with a public interest. *Yates v. Milwaukee*, 10 Wall. 496, 505; *Coe v. Schultz*, 47 Barb. 64; *Lawton v. Steele*, supra. The right to require a license exists only to promote the welfare of the community. *Tiedeman*, Lim. 301; *State v. Conlon*, supra; *Cooley*, Torts (2d Ed.) 328. Statutes which have attempted to regulate payment of wages have almost uniformly been held void, in that they trench on the right of individuals to contract. *Frorer v. People*, supra; *Braceville v. People*, 147 Ill. 66; *Ex parte Kuback*, 85 Cal. 274; *State v. Goodwill*, supra. The state may not under pretense of a police regulation impose a trammel on constitutional rights. *State v. Julow*, 129 Mo. 163; *Stockton Laundry Case*, 26 Fed. 611. It is not enough to warrant legislative interference that employers in a particular business oppress their employees. *State v. Loomis*, supra.

The act is in violation of the state and federal constitutions. If the act interferes with the natural and inalienable rights of citizens as guaranteed by the general purpose and spirit of the constitution, it is void. *Com. v. Perry*, 155 Mass. 177; *Dabbs v. State*, 39 Ark. 353; *Low v. Rees*, 41 Neb. 127; *Gulf, C. & St. F. Ry. Co. v. Ellis*, 165 U. S. 150, 159. The rights to labor, to contract, and to engage in lawful business, when not harmful to the community, are essential attributes of free citizenship under the state and federal constitutions; and the legislature may not abridge or deny the exercise of these rights, save for the protection of the public from the infliction of common injury; and none of these rights may be invaded save by due process of law. *Yick Wo v. Hopkins*, 118 U. S. 356; *Livestock Assn. v. Crescent Co.*, Fed Cas. No. 8,408; *Barbier v. Connolly*, 113 U. S. 27; *Civil Rights Cases*, 109 U. S. 3, 24; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.*, 111 U. S. 746; *Ward v. Maryland*, 12 Wall. 418, 430; *Slaughter House Cases*, 16 Wall. 36, 97; *Bertholf v. O'Reilly*, 74 N. Y. 509; *In re Jacobs*, 98 N. Y. 98; *State v. Julow*, supra; *State v. Scougal*, supra; *People v. Gillson*, 109 N. Y. 389; *People v. Otis*, 90 N. Y. 48; *In re Parrott*, 6 Sawy. 349; *State v. Goodwill*, supra; *Godcharles v. Wigeman*, 113

Pa. St. 431; *Allgeyer v. Louisiana*, *supra*; *Holden v. Hardy*, 169 U. S. 366; *Cooley*, *Torts* (2d Ed.) 327; *Cooley*, *Const. Lim.* (6th Ed.) 744, 745. As to what is due process of law, see *Cooley*, *Const. Lim.* (6th Ed.) 431, 432; *Wynehamer v. People*, 13 N. Y. 378; *Missouri P. Ry. Co. v. Humes*, 115 U. S. 512. In all cases of legislation within the police power, the act must be based on some justifying condition then existing. *Leep v. Railway*, 58 Ark. 407. See *State v. Julow*, *supra*; *Yates v. Milwaukee*, *supra*; *Coe v. Schultz*, *supra*; *Lawton v. Steele*, *supra*.

The act is void as class legislation. *State v. Cooley*, 56 Minn. 540, 550; *Deppe v. Chicago*, 36 Iowa, 52; *Gulf, C. & St. F. Ry. Co. v. Ellis*, *supra*; *State v. Spaude*, 37 Minn. 322, 324; *Cameron v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 384; *State v. Ritt*, 76 Minn. 531; *Wally v. Kennedy*, 2 Yerg. 554, 10 Tenn. 554; *State v. Goodwill*, *supra*; *Utsey v. Hiott*, 30 So. C. 360; *Sanborn v. Commissioners of Rice Co.*, 9 Minn. 258 (273); *State v. Conlon*, *supra*; *Johnson v. St. Paul & D. R. Co.*, 43 Minn. 222; *State v. Sheriff of Ramsey Co.*, 48 Minn. 236; *Shaver v. Pennsylvania Co.*, 71 Fed. 931; *Frorer v. People*, 141 Ill. 171; *Low v. Rees*, *supra*; *State v. Wagener*, *supra*; *State v. Gardner*, *supra*; *San Antonio v. Wilson* (Tex. App.) 19 S. W. 910; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96. Equal protection of the laws insures equality of accessibility to the courts. *Minneapolis & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26; *Cooley*, *Const. Lim.* 483.

The act conflicts with *Const. (Minn.) art. 1, §§ 2 and 8*. It conflicts with *Const. (Minn.) art. 1, § 10*. *Boyd v. U. S.*, 116 U. S. 616. The act must be condemned because it requires commission merchants to extend special advantages to a small class of the community. *Lake Shore & M. S. Ry. Co. v. Smith*, 173 U. S. 684. It robs consignors, as well as commission merchants, of a vested right,—the power to contract. *Shaver v. Pennsylvania*, *supra*; *Frorer v. People*, *supra*. But however flagrant the invasion of individual rights, the greatest danger lies in the harvest that must inevitably follow from the sowing of such seed. See *In re Jacobs*, *supra*; *People v. Marx*, 99 N. Y. 377; *State v. Goodwill*, *supra*.

W. B. Douglas, Attorney General, and *Childs, Edgerton & Wickwire*, for respondents *Wagener* and *Megaarden*.

The judiciary has no authority to overthrow a statute because it may be deemed unwise, inexpedient or unjust. *Butler v. Chambers*, 36 Minn. 69, 73; *State v. Aslesen*, 50 Minn. 5; *State v. Corbett*, 57 Minn. 345; *Rippe v. Becker*, 56 Minn. 100, 108; *Cooley, Const. Lim.* (6th Ed.) 197; *State v. Chicago, M. & St. P. Ry. Co.*, 68 Minn. 381; *State v. Peel*, 36 W. Va. 802, 810; *Powell v. Pennsylvania*, 127 U. S. 678, 687; *Missouri P. Ry. Co. v. Humes*, 115 U. S. 512, 519; *State v. Chapel*, 64 Minn. 130.

The act is a legitimate exercise of the police power. The police power is not restricted to questions of public health, morals and peace. It extends to all other subjects in the use, control or destruction of which the general welfare is involved. *Lawton v. Steele*, 152 U. S. 133; *Thorpe v. Rutland*, 27 Vt. 140, 149; *Pacific Ex. Co. v. Seibert*, 142 U. S. 339; *Slaughter House Cases*, 16 Wall. 36; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Boyd v. Alabama*, 94 U. S. 645; *Munn v. Illinois*, 94 U. S. 113; *Missouri P. Ry. Co. v. Mackey*, 127 U. S. 205; *Budd v. New York*, 143 U. S. 517; *Brass v. North Dakota*, 153 U. S. 391; *Cooley, Const. Lim.* (6th Ed.) 706; *Minneapolis & St. L. Ry. Co. v. Herrick*, 127 U. S. 210; *State v. Corbett*, *supra*; *State v. Chapel*, *supra*; *Hawthorn v. People*, 109 Ill. 302; *Duncan v. Missouri*, 152 U. S. 377; *State v. W. W. Cargill Co.*, *supra*, page 223; *Marmet v. State*, 45 Oh. St. 63; *State v. Chicago, M. & St. P. Ry. Co.*, *supra*; *Railroad Co. v. Husen*, 95 U. S. 465. When the subject is within the police power, the extent to which it shall be exercised and the regulations to effect the desired end are generally wholly within the discretion of the legislature. *State v. Smith*, 58 Minn. 35. See also *State v. Edwards*, 86 Me. 102; *Baker v. State*, 54 Wis. 368; *Nash v. Page*, 80 Ky. 539, 550; *Brechbill v. Randall*, 102 Ind. 528; *Mangan v. State*, 76 Ala. 60; *State v. Harrington*, 68 Vt. 622.

The act is not void because discriminating or class legislation. Where a law operates alike on all persons under like circumstances, there is no discrimination. *Missouri P. Ry. Co. v. Mackey*, *supra*; *Powell v. Pennsylvania*, *supra*; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Missouri P. Ry. Co. v. Humes*, *supra*; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628; *State v. Smith*, *supra*; *Marmet v. State*, *supra*; *Cleveland v. Backus*, 133 Ind. 513. The legislature may require a license in any business.

Bullitt v. City (Ky.) 3 S. W. 802; *Ex parte Mirande*, 73 Cal. 365; *City v. Barton*, 33 Ark. 436; *Hinckley v. City*, 43 Ill. 183. See *Union v. De Busk*, 12 Colo. 294.

The requirement of a bond is no objection to the validity of the act. *Brass v. North Dakota*, *supra*; *Hawthorn v. People*, *supra*. Clothing the commission with powers of investigation is no objection. The act contemplates a hearing. *Endlich*, *Interp. St.* § 428. See *State v. Peterson*, 50 Minn. 239. The legislature could make the report of the commissioners *prima facie* evidence. *Cooley*, *Const. Lim.* (6th Ed.) 452; 11 *Am. & Eng. Enc.* (2d Ed.) 551; *Steeneron v. Great Northern Ry. Co.*, 69 Minn. 353, 376; *Missouri v. Merrill*, 40 Kan. 404; *Augusta v. Randall*, 79 Ga. 304.

The act does not conflict with *Const. (Minn.) art. 1, § 10*. *Weimer v. Bunbury*, 30 Mich. 201. The law does not authorize the commission to compel commission merchants to produce evidence of an incriminating character. The court will not import into the act any such meaning. *Endlich*, *Interp. St.* §§ 264, 523; *Cooley*, *Const. Lim.* (6th Ed.) 218. The act does not deprive the merchant of his property without due process of law. The fourteenth amendment does not impose restraints on exercise of the police power. *Barbier v. Connolly*, *supra*; *Mugler v. Kansas*, 123 U. S. 623; *Kidd v. Pearson*, 128 U. S. 1; *Giozza v. Tjernan*, 148 U. S. 657; *People v. King*, 110 N. Y. 418; *Newark v. Hunt*, 50 N. J. L. 308; *State v. Corbett*, *supra*; *Burdick v. People*, 149 Ill. 600; *Butler v. Chambers*, 36 Minn. 69. It must be presumed that the legislature determined on full investigation and reasonable grounds that the act was a necessary regulation and a preventive of fraud. *Stolz v. Thompson*, 44 Minn. 271, 274.

There is no delegation of legislative authority to the commission. *City v. Leebrick*, 43 Iowa, 252; *City v. Dickinson*, 23 Neb. 426; *State v. New Haven*, 43 Conn. 351; *People v. Dunn*, 80 Cal. 211; *Territory v. Scott*, 3 Dak. 357; *Home v. Swigert*, 104 Ill. 653; *Phoenix v. Welch*, 29 Kan. 672; *Martin v. Witherspoon*, 135 Mass. 175; 6 *Am. & Eng. Enc.* (2d Ed.) 1022; *Ryan v. Outagamie*, 80 Wis. 336; *Rockwell v. County of Fillmore*, 47 Minn. 219. Legislative functions which are merely administrative or executive may be delegated to other departments or bodies. *Moers v. City*, 21 Pa. St. 188, 202;

Dowling v. Lancashire, 92 Wis. 63, 68; Georgia v. Smith, 70 Ga. 694; People v. Brooks, 101 Mich. 98; State v. Stewart, 74 Wis. 620; People v. Long Island, 134 N. Y. 506; Ex parte Bassitt, 90 Va. 679; Locke's Appeal, 72 Pa. St. 491, 498.

The act is not a regulation of commerce. *Hinson v. Lott*, 8 Wall. 148; *Mayor v. Miln*, 11 Pet. 102; *Machine Co. v. Gage*, 100 U. S. 676; *Webber v. Virginia*, 103 U. S. 344; *Cleveland v. Backus*, supra; *Ficklen v. Shelby Co. Taxing District*, 145 U. S. 1. A statute is not to be deemed a regulation of commerce merely because it indirectly affects it. *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613. The police power was not surrendered to congress; and until congress acts, the state is at liberty to act, save as restrained by some provision of the federal constitution other than the commerce clause. *License Cases*, 5 How. 504; *Wilson v. Black Bird*, 2 Pet. 245. Even where congress has acted, a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of congress, unless the repugnance is so direct that the two acts cannot be reconciled. *Sinnot v. Davenport*, 22 How. 227. See also *Hennington v. Georgia*, 163 U. S. 299; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677; *Gladson v. Minnesota*, 166 U. S. 427; *Plumley v. Massachusetts*, 155 U. S. 461; *Osborne v. Florida*, 164 U. S. 650.

COLLINS, J.²

Habeas corpus proceedings originally instituted in Ramsey county, and coming here on appeal; the purpose being to test the constitutionality of Laws 1899, c. 225. The court below sustained the act, and remanded the prisoner, Redpath. The same questions were raised in another proceeding (*State v. Megaarden*), and the cases have been argued as one by eminent counsel, who have ably and exhaustively presented their views,—orally as well as upon briefs.

The title of the act assailed as unconstitutional for a number of reasons is as follows:

“An act to license and regulate and define business of commission

² BUCK, J., absent, took no part.

merchants or persons selling agricultural products and farm produce on commission, and to require them to give a bond to the state of Minnesota for the benefit of their consignors, and prescribing a penalty for the violation of any of the provisions of this act."

It consists of eight sections, the first declaring it shall be unlawful from and after June 1, 1899, for any person, firm, or corporation to engage in the business of selling agricultural products and farm produce on commission in this state without first obtaining a license from the state railroad and warehouse commission. A bond with sufficient surety is required for the benefit of consignors, the amount of the penalty to be fixed by the commission; and, if the principal therein is to receive grain for sale, the condition of this bond is that he will faithfully account and report to all persons intrusting him with grain, and will pay over to them all proper proceeds. If grain is not received for sale on commission, the bond is to be conditioned for the faithful performance of the commission merchant's duty. By the second section the merchant who sells grain is required to render a certain statement to his consignor within 24 hours after a sale of all or a portion of such grain. The third section relates to products and produce other than grain. If a consignor shall not receive report of a sale or a remittance therefor after demand, or if, after a report is made, he is dissatisfied with it or the sale, he may complain to the railroad and warehouse commission, whose duty it is to investigate the case, and after such investigation to make a written report to the complainant; and this report is made prima facie evidence of the matters therein contained. In making this investigation power is conferred upon the commission, in express terms, to compel the merchant "to produce his record or memoranda of such sale, and give them all information in his possession regarding the report and sale so complained of."

Section 4 provides for the machinery of the act. A commission merchant desiring to procure a license must make application in writing to the railroad and warehouse commission, the application to contain certain information in respect to the nature of the business to be done by the applicant, his proposed place of busi-

ness, and the probable amount of business to be done each month. It is then incumbent on the commission to fix the amount of the bond required, and upon the execution of such a bond with sufficient security, and the payment of a fee of one dollar, to issue a license for one year. An additional bond may be required whenever it shall be deemed necessary by the commission, the amount thereof to be determined by that body. And herein the railroad and warehouse commission is given authority to revoke licenses under certain conditions. Section 5 provides for an action upon the bond by the consignor in case a consignee fails or neglects to account and report a sale, or neglects to pay over the moneys due on account of a sale, recovery to be had against the principal and sureties of the bond, with a proviso as to a distribution of the amount received in case default has been made as to two or more consignors, and such amount is insufficient to discharge the entire liability. Section 6 defines a commission merchant within the meaning of the act, while section 7 declares that any person, persons, or corporation engaged in selling any of the property for which a license is required, who fails or neglects to comply with any of the provisions of the act, shall be guilty of a misdemeanor, and on conviction shall be punished by a fine. Section 8 merely provides when the act shall take effect.

It is urged by counsel for the relator that this act is unconstitutional on several grounds. It is argued that under its provisions the privileges and immunities of citizens of the United States are abridged; that persons may be deprived of their liberty and property without due process of law; that it denies to certain persons within its jurisdiction the equal protection of the law; that it deprives certain people of the right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures; that it compels certain persons in criminal cases to be witnesses against themselves; that it interferes with and attempts to regulate commerce between the state of Minnesota and other states; and, further, that it exceeds the power conferred by the state constitution, in that it attempts to delegate legislative powers, vested solely and exclusively in the legislative body.

1. In the course of the argument, relator's counsel have attacked the wisdom of this legislation, and have attempted to point out wherein the law has imposed onerous duties and obligations upon those who come within its terms. But, if this law is open to these criticisms, the remedy is with the people. The expediency of this enactment, and the propriety or wisdom of some of its sections, in which details are prescribed, are matters strictly within the legislative powers. If the act is inexpedient and unwise, or if some of its requirements are too exacting, the appeal should be to the representatives of the people, not to the courts.

2. Obviously, the act was not intended as a measure for the accumulation of a public revenue, and, if sustained at all, it must be upon the ground that it is a lawful regulation for the public good,—a legitimate exercise of the police power of the state.

The design seems to have been to protect a large class of people, engaged in agricultural pursuits, and more or less remote from market, from imposition and actual fraud when intrusting their products and produce into the hands of commission men for sale. And it is no argument against the statute to say that commission men are engaged in a legitimate business, and for that reason are not subject to police regulation, if the public good demands it. The operation of railways, the conducting of banks, the loaning of money at interest, the insurance business, the operation of custom gristmills, or grain elevators and warehouses, peddling from house to house, and the keeping of bakeries, butcher shops, hotels, restaurants, and saloons, are each legitimate and lawful occupations in this jurisdiction; but all may be subject to police regulation, and most of them are. But, of course, the right of the state to exercise police power over its citizens and their occupations is not unlimited.

The term "police power," as understood in American constitutional law, means simply the power to impose such restrictions upon private rights as are practically necessary for the general welfare of all. *Rippe v. Becker*, 56 Minn. 100, 57 N. W. 331. And it must be confined to such restrictions and burdens as are thus necessary to promote the public welfare, or, in other words, to prevent the infliction of public injury. *State v. Chicago, M. & St.*

P. Ry. Co., 68 Minn. 381, 71 N. W. 400. And in the exercise of its police powers a state is not confined to matters relating strictly to the public health, morals, and peace, but, as has been said, there may be interference whenever the public interests demand it; and in this particular a large discretion is necessarily vested in the legislature, to determine not only what the interests of the public require, but what measures are necessary for the protection of such interests. *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499. If, then, any business becomes of such a character as to be sufficiently affected with public interest, there may be a legislative interference and regulation of it in order to secure the general comfort, health, and prosperity of the state, provided the measures adopted do not conflict with constitutional provisions, and have some relation to, and some tendency to accomplish, the desired end. The subjects which may be legislated upon are, of necessity, continually arising as business increases, and new phases, conditions, and methods appear. The development of the law relating to the proper exercise of the police power of the state clearly demonstrates that it is very broad and comprehensive, and is exercised to promote the general welfare of the state, as well as its health and comfort. And the limit of this power cannot and never will be accurately defined, and the courts have never been willing, if able, to circumscribe it with any definiteness.

The inquiry, then, is as to how and to what extent the business in question had become affected with public interests. What evils or supposed evils did the members of the legislature have in mind, and were attempting to remedy, when enacting this law?

The fact is that the public generally looked with distrust upon the methods of merchants engaged in selling agricultural products and farm produce upon commission, perhaps without good reason. It had become a matter of common talk among the people that those who handled wheat imposed upon their consignors by reporting sales and accounting for the proceeds at the lowest prices at which that article had been sold within the period of time during which the sale could have been made, and without regard to the prices actually obtained. With prices fluctuating at all times, as is the fact in the wheat market, and rarely remaining station-

ary for more than a few minutes at a time, the opportunity for fraud seems to be without limit when selling this commodity on commission. In addition to this is the fact that the consignor usually resides at a considerable distance from the commission merchant, and is practically unable to discover whether he has been cheated or not. And, with respect to other agricultural products and farm produce, it is to be observed that they are largely of a perishable nature, and subject to rapid deterioration in transit, or after reaching the consignee. This fact gives to the latter an opportunity to falsify his report of a sale to the distant consignor, and to insist that the article consigned had become more or less unmarketable before sale could be made; and here, as in the case of grain, the latter has little or no opportunity to ascertain the truth.

Without wishing to intimate that fraud of this nature had actually become so prevalent as to justify the accusation made, we do say that a majority of the people in this state had become convinced of the truth of these charges, and in great numbers besieged the legislature in behalf of the suppression of the alleged evil practices. This was a matter of common knowledge. It was publicly believed that the business of selling agricultural products and farm produce on commission had become saturated with false and fraudulent methods, to the great injury of a large class of our citizens, who were compelled to deal with commission men, and who were powerless to detect or prevent the wrong, and that the business had thus become sufficiently affected with public interests to be the proper subject of police regulation. We are of opinion that the legislature did not exceed its powers when, under the circumstances, it enacted a measure having relation to, and a tendency to accomplish, the desired end, such as is the law now before us.

This enactment was designed to prevent false and fraudulent practices of the character complained of, to correct the evils generally believed to prevail, and to compel the merchant to whom property was consigned for sale on commission to deal honestly and to be faithful to his trust. Such a law is not unusual. It only requires a consignee to render an account of his management of a consignor's property. "He holds himself out as a factor for the

management and sale of other people's property, and in that respect is like a public warehouseman." *Hawthorn v. People*, 109 Ill. 308,—a case in which a statute (much like the one at bar) requiring operators of butter and cheese factories on the co-operative plan to give bonds, and to make written reports of their business at the end of each month, was held to be constitutional, as a valid exercise of the police power.

3. But it is strenuously argued that this statute is void because it is discriminating or class legislation. In *State v. Cooley*, 56 Minn. 540, 550, 58 N. W. 153, it was said that class legislation is

"Legislation which selects particular individuals from a class, and imposes upon them special burdens, from which others of the same class are exempt, and thus denies them the equal protection of the laws."

But the class here created consists of those who engage in the business of receiving agricultural products and farm produce for sale, or receive or solicit the same for sale; in short, those who are engaged in the business of selling the same. The class is as broad as it need be. The peculiar characteristics of the agricultural products and farm produce already referred to, and the liability to peculiar abuses resulting from a sale thereof on commission, are such as to suggest the practical necessity for distinctive legislation on the subject,—different from what would be expedient or necessary in the case of other property sold on commission,—and to justify the legislature, in its discretion, in putting those who sell such articles on commission in a class by themselves. It was the evils which were thought incident to the sale of agricultural products and farm produce which evoked the law. Here was a class of merchants who for certain reasons, hereinbefore specified, had peculiar opportunities to defraud, not common to other merchants, although they might sell on commission, and it was this class that the legislature proposed to put under restraint.

Nothing is proven by arguing that there are other lines of business conducted in quite as objectionable a manner; for, if the argument had merit, it would follow that all kinds of business which

need regulation must be legislated upon at the same moment. The legislature may proceed as the public welfare and prosperity of the citizens it represents may seem to demand. In this state the legislature has already regulated the method of conducting various kinds of legitimate business, and brought them under police enactments, as before stated. It has done this with respect to the business of insurance; it has required that bonds shall be filed and licenses obtained before any person shall undertake to conduct an employment bureau or agency; and it has compelled contractors upon public work to protect their employees and insure the payment of their wages by means of bonds, upon which those interested may maintain actions, if necessary. These illustrations of what has been done in the proper exercise of the police power of the state could easily be continued, but it would serve no good purpose.

One point made against this statute is that it distinguishes and discriminates as between the persons it seeks to operate upon, in that it arbitrarily requires those who sell grain to give bonds containing certain stated conditions, and to render certain statements and reports at once, while other persons brought within its influence must give bonds with wholly different conditions, and are not compelled to make these statements or reports. But there is an apparent and just reason for this distinction, as there is for distinguishing between the commission merchants mentioned in the law and other commission merchants; and it arises out of the peculiar conditions which surround the selling of grain, and to which we have before alluded.

The law was framed to meet the crying evils which it was believed had grown up in connection with this branch of business. The treatment of consignors was frequently most exasperating and injurious to them. Sometimes reports were never made of sales, and on other occasions were purposely delayed so that it would be difficult, if not impossible, for the consignor to ascertain the real facts of a given sale. Prices of grain fluctuated, not only from day to day, but from hour to hour. It might make a great difference to the consignor whether his grain was sold in the morning or near the close of the day. And for these reasons the law has therefore

studiously provided that the reports of sales shall state the day, hour, and minute when they are made. Such a provision was deemed a reasonable regulation in checking one of the alleged evils of the business,—an evil which could not be remedied without special effort in the way of conditions not necessary to impose upon merchants handling other products and produce on commission. So the grain commission man has no reason to complain because he is compelled to heed certain provisions of the law which are not to be observed by commission men who sell other articles covered by the statute, for the conditions surrounding the sale are entirely different. And this is the fact with reference to the shipper. He has no right to object on the ground that the law throws around the property of another shipper greater safeguards than he has, provided the property of the other is of such a character as to demand other and greater protection.

Counsel for relator assume that the statute is objectionable because the farmer who consigns cattle, wool, or hides is not protected at all, while his neighbor who ships wheat or potatoes is. Admitting that cattle, wool and hides are not agricultural products or farm produce, and therefore not covered by the law, we have no hesitation in saying that the conditions which surround the consignment and sale upon commission of those articles are radically different from those pertaining to the consignment and sale of grain or other property strictly within the act, and this difference justified the distinction, if one there be. The market price of cattle, wool, or hides does not fluctuate from hour to hour, as does that of wheat, nor are they as perishable in their nature as the ordinary products of the farm, and therefore the opportunity for imposition is not so great. There is good ground in many ways for the distinction, if it has been made by the law. This statute treats all persons subject to it alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed.

The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to

impair that equal right which all can claim in the enforcement of the law. *Soon Hing v. Crowley*, 113 U. S. 703, 705, 5 Sup. Ct. 730. And a law which is confined in its application to a particular class of persons is not void, as unequal class legislation, if the distinction is based on some reason of public policy, and applies to and embraces all persons alike under similar circumstances.

Finally, upon this point, it may be said that the requirement as to a bond does not affect the validity of the statute. *Brass v. North Dakota*, 153 U. S. 391, 14 Sup. Ct. 857,—an instructive case upon the subject herein involved; also *Hawthorn v. People*, *supra*.

4. It is objected that the statute is an unlawful and forbidden interference with interstate commerce.

It is well settled that a law cannot be deemed a regulation of commerce among the states merely because it may incidentally or indirectly affect it. *Missouri, K. & T. Ry. Co. v. Haber*, 169 U. S. 613, 18 Sup. Ct. 488. At most, this statute regulates the business of certain classes of commission men within this state, and is nothing but an ordinary police regulation, enacted in good faith, and intended to promote the general welfare and prosperity of the people within our borders. As was said in *Hennington v. Georgia*, 163 U. S. 299, at page 318:

“Such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the State by which it was established, and, therefore, not invalid by force alone of the Constitution of the United States.” See also *Plumley v. Massachusetts*, 155 U. S. 461, 15 Sup. Ct. 154; *Gladson v. Minn.*, 166 U. S. 427, 17 Sup. Ct. 627.

And it may further be observed that the statute does not in terms apply to interstate business, and it will not be implied that the legislature intended to go beyond its lawful powers in enacting it. If, therefore, it be held that the legislature could not forbid one to engage in the business of a commission merchant, as to interstate shipments, without compliance with the provisions of the state statute, such statute should be construed to apply only to a local

or domestic business; and such construction will be followed by the federal courts. *Osborne v. Florida*, 164 U. S. 650, 17 Sup. Ct. 214.

5. It is further contended that in this statute there is a delegation of legislative authority, in open defiance of the provisions of our state constitution. This is predicated upon the provision that the railroad and warehouse commission may fix the amount of the bond arbitrarily, and upon the assertion that it may capriciously accept a straw bond in one case, and refuse the best possible bond in another.

It is true that the amount of the bond and the sufficiency of the surety are to be determined by the commission, but the presumption is that this will be done in a proper and just manner, not as counsel would seem to contend. Fixing the amount of such a bond, and the requirements as to sureties, are purely administrative duties. It is necessary to lodge discretion somewhere, as manifestly it would be impracticable for the statute to prescribe the amount of bond for each of the numberless cases which arise. The possibility that the commissioners may not always act justly is no objection to the statute. *Cooley*, Const. Lim. 197. Laws containing provisions of this nature are very common in this state, as well as in other jurisdictions, and need not be specified, nor need attention be directed to decisions elsewhere upholding them; for the subject involved is discussed and disposed of in *State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281, 37 N. W. 782.

6. It is also argued that section 3 is unconstitutional upon the ground that it violates the rights of the people of this state to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and also that it violates the provision that no person shall be compelled in any criminal case to be a witness against himself. We express no opinion upon the question, for it is not in the case. Conceding that the objectionable portions of section 3 are in direct opposition to the constitutional rights referred to, the law may stand, without these portions, as a full, complete, and enforceable statute. To the complaint on which the prisoner was arrested it is no defense to say that portions of section 3 are unconstitutional.

The court below ruled correctly in the proceedings, and, as pro-

vided in Laws 1895, c. 327, § 3, final judgment may be entered in this court discharging the writ, and remanding the prisoner to the custody of the sheriff of Ramsey county for further proceedings. Let judgment be so entered.

The following opinion was filed November 10, 1899:

PER CURIAM.

Counsel for relator in a petition for reargument urge two points to which brief reference should be made. The first is that, for the purpose of sustaining the classification as made in the law, the court announced that certain conduct on the part of persons who handled wheat on commission had become a matter of common talk among the people of the state, and this announcement, counsel insist, is wholly without foundation, and absolutely erroneous. Whether we were right or wrong in this is of no moment. The basis of the opinion, as is obvious from a reading, is that this particular business of selling agricultural products and farm produce is affected with a public interest, and is liable to abuse, and for these reasons is subject to police regulation by legislative act. Nothing more is necessary on this point.

The second point relates to the alleged arbitrary action of the railroad and warehouse commission when prescribing what is required of those who apply for licenses; copies of a circular letter issued by the commission and of the bond demanded being attached to the petition. It is enough to say on this point that this action cannot affect the validity of the law; and, further, that, if arbitrary and oppressive, there is an adequate and complete remedy in the hands of those who have cause for complaint.

Petition denied.

MICHAEL J. REEM v. ST. PAUL CITY RAILWAY COMPANY.

October 26, 1899.

Nos. 11,737—(36).

77	50
82	50
77	50
88	21
77	50
86	28

Negligence of Carrier.

The exposure of a passenger to danger which the exercise of reasonable foresight would have anticipated, and due care have avoided, is negligence on the part of a carrier.

Street Railway—Negligence.

When a street-railway company undertakes to carry large numbers of people, vastly in excess of the seating and standing capacity of its cars, and permits passengers to ride on the platforms, stops its cars when in such crowded condition that other persons may get upon them, and, because of the crowd, a passenger who has boarded a car before it was crowded is pushed off a platform and injured, the company is guilty of negligence.

Evidence—Res Gestae.

Held, in an action brought to recover on account of injuries alleged to have been received under such circumstances, that the court erred when permitting a witness to testify as to what the conductor of the car said to her immediately after the accident. In this instance the conductor's statement was no part of the res gestae, for, although it may have been contemporaneous in point of time, it did not illustrate, or explain, or characterize the transaction in any degree.

Evidence—Admission of Claim Agent.

Held, further, that the court was in error when it allowed a witness to testify as to an admission made concerning the case by defendant's claim agent.

Action in the district court for Ramsey county by plaintiff, an infant, by his guardian ad litem, to recover \$30,000 damages for personal injuries. The case was tried before O. B. Lewis, J., and a jury, which rendered a verdict in favor of plaintiff for \$10,500. On motion of defendant for judgment notwithstanding the verdict or for a new trial, the court made an order denying judgment notwithstanding the verdict, but granting a new trial unless plaintiff consent to a reduction of the verdict to \$7,000. Plaintiff consented

to the reduction, and from the order defendant appealed. Reversed.

Munn & Thygeson, for appellant.

J. W. Pinch and *John D. O'Brien*, for respondent.

COLLINS, J.

The evidence in this case tended to show that the boy, aged about 15 years, who was injured, hereinafter called "plaintiff," was a passenger on a "trailer" upon one of defendant's electric lines in the city of St. Paul. The car was crowded when plaintiff got on. He could not get a seat, nor was there standing room on the rear platform or the aisle. He jumped off a rear step at the first stop, ran ahead, and stood on the front platform, with one hand on the chain which, stretched from the front dashboard to a corner stanchion, was designed either to keep passengers from getting on or off at that place, or for protecting those already on, or possibly for both purposes. At the time he took this position, the front platform was not crowded; but afterwards the car was stopped for passengers, those in the rear were directed by the conductor to move up in front, and this they did until the front platform was much crowded. The boy was pushed against the chain. It gave way, and he was thrown upon the ground, receiving the injuries complained of.

On this evidence the question of defendant's negligence, and also that of plaintiff's contributory negligence, were for the jury. The defendant's negligence consisted, if there was any, in stopping the car for passengers, thereby inviting them to get on, until the entire car, including the front platform, became so congested that plaintiff was crowded off. The exposure of a passenger to a danger which the exercise of reasonable foresight would have anticipated, and due care have avoided, is negligence on the part of a carrier. There was evidence which warranted the jury in finding that defendant undertook to carry more passengers than could sit and stand within the car and on the platforms, both of which were filled to their utmost capacity, and the direct result was that plaintiff was pushed off the car and injured.

It must be held that when a street-railway company undertakes

to carry large numbers of people, vastly in excess of the seating and standing capacity of its car, and permits passengers to ride on the platforms, stops its car when in such crowded condition that other persons may get upon it, and, because of the crowd, a passenger, who has boarded the car before it became crowded, is pushed off a platform to his injury, the company is guilty of negligence. See *Lehr v. Steinway*, 118 N. Y. 556, 23 N. E. 889; *Topeka v. Higgs*, 38 Kan. 375, 16 Pac. 667. And if plaintiff was guilty of contributory negligence it was because he failed to exercise ordinary care to avoid danger, while one of the crowd on this front platform.

It was on these theories that the court, in its charge, submitted the cause to the jury. The jury found specially that the accident was caused by the overcrowding of the car, and also found a general verdict against defendant. But there must be a new trial for two reasons:

1. Plaintiff produced as a witness a lady by the name of Jaehn, who was upon the car when he fell. Miss Jaehn testified that she saw him after he had fallen, and told the conductor that some one had been run over. She was then asked to state what she said to the conductor, and what he said to her. Objection was made to this class of testimony, and particularly as to what the conductor said; but the court overruled the objection, and allowed the witness to narrate what was said, as follows:

"Well, right when he fell, and I noticed it, why the conductor stood between me and a lady friend of mine. Of course, my back was turned to him, but I quickly turned around; and he took her fare; and I turned around and yelled at him. Of course, I don't remember the exact words, but I yelled out something in astonishment, and told him to stop. And he never said a word, but run over and took some names down, or I thought he took some names down. And some one yelled to him to stop the car. He came back, and I took hold of his coat, and yelled at him to stop the car. And he said: 'Never mind, lady; never mind. Just give me your fare.' So, of course, I gave him my fare, and shut up."

The neglect of the conductor to stop the car, that the plaintiff's condition might be learned, and his apparent heartlessness when informed that some one had been run over, as shown by his answer, were dwelt upon at length by plaintiff's counsel when addressing

the jury, and, we have no doubt, had influence in the determination of the case. The testimony as to what the conductor said was clearly incompetent, and unquestionably was very prejudicial. Its tendency was to influence the minds of the jurors, and to arouse feeling against defendant. There was no pretense that the conductor saw the boy when he fell, or that he even knew that a passenger had been injured, when calling upon Miss Jaehn to pay her fare. It was no part of the *res gestæ*, for the declaration of a party, to be admissible as a part of the *res gestæ*, must be contemporaneous with, or at least so connected with, the main fact in issue, as to constitute a part of the transaction, and thus derive credit from the main fact or act itself, to explain or characterize which it is offered in evidence. *Conlan v. Grace*, 36 Minn. 276, 280, 30 N. W. 880. The rule is frequently expressed in the following language:

"The declaration should be contemporaneous with the transaction in issue. There is no doubt but that the declaration must be a part of the transaction, and that it must illustrate or explain it. The declarations must be calculated to unfold the nature and quality of the facts which they are intended to explain. They must so harmonize with those facts as to form one transaction."

Now, the remark or declaration of the conductor was no part of the transaction, nor did it illustrate or explain or characterize it in the slightest degree. The issues were, did defendant negligently permit or cause the car to be overcrowded? and, if so, did this overcrowding cause plaintiff's injuries? The remark of the conductor had no bearing on these issues, was no part of the transaction, derived no credit from the main fact or act, and did not explain or elucidate or characterize it in any way.

"There must be a main or principal fact or transaction, and only such declarations are admissible as grow out of the principal transaction, illustrate its character, are contemporary with it, and derive some degree of credit from it." *Lund v. Inhabitants*, 9 Cush. 36, 42.

But counsel for plaintiff insist that the conductor's declaration was admissible as part of the *res gestæ*, because it indicated "confusion of mind and loss of control of himself or over his car," and

therefore to explain or characterize the condition of things which they claim existed. This is a matter of opinion, perhaps, but, if the conductor had no knowledge of an accident when he made the remark, it explains nothing, and characterizes no act. If he did know that some one had been injured by the car, the language used shows rather clearly that he was not at all confused, or even disturbed. It demonstrates that he was cool and deliberate, as well as heedless and heartless. It was error to permit the witness to state what the conductor said to Miss Jaehn.

2. The court also erred when permitting the witness Pinch to testify as to what he had been told by Mr. Esterly. There was no pretense that this was any part of the *res gestæ*.

Esterly was the defendant's claim agent, engaged in looking up witnesses having knowledge of facts bearing upon any claims which might be made against his principal,—that made by plaintiff, among others. It had been asserted by defendant's counsel at the trial that the company had never been able to find the conductor of the car from which plaintiff fell, and for that reason had no knowledge of the facts in the case. Thereupon Mr. Pinch was called as a witness, and, over counsel's objection, was permitted to testify, for the purpose of showing that defendant company "had evidence within its possession, and purposely withheld it," that on one occasion Esterly stated to him that defendant had found out who the conductor was, and had learned all about the accident; and, further, that, on being asked the name of the conductor, Esterly made no answer. Mr. Esterly had not been questioned at the trial in regard to this subject. There was no evidence that he had any right or authority to make any admissions. There was no evidence or foundation laid to show that he was then and there transacting any business which would make this declaration or admission part of the *res gestæ*. There was no testimony to which this admission served the purpose of impeaching testimony, but it was offered as original, substantive evidence of an admission by which defendant should be bound.

The admission of this testimony was an absolute disregard of the well-known rule that "declarations or admissions made by an agent or employee are not admissible against his principal, unless they

relate to a transaction in which the agent or employee has real or apparent authority to act for the principal, and unless they are made during that very transaction, and thus constitute a part of the *res gestæ*." Mr. Esterly had no real or apparent authority to make an admission of this character which would bind his principal. He was simply a claim agent, engaged in securing evidence as to facts involved in claim cases as they arose and were placed in his hands. He had no real or apparent authority to state what his principal had learned in respect to the conductor or the accident.

In view of the fact that a new trial must be had, other assignments of error need no consideration.

Order reversed.

The following opinion was filed November 10, 1899:

PER CURIAM.

In a petition for reargument, plaintiff's counsel insist that the statement in the opinion that there was no pretense that the conductor knew when talking with the witness Jaehn that a passenger had fallen from the car is opposed to the testimony; that it appears that he did know of the accident when the conversation occurred, and for this reason his remark was admissible, as part of the *res gestæ*. We do not agree with counsel in their assertion as to the proof on this point, although it is possible to infer that the conversation with Miss Jaehn was after other passengers had called the conductor's attention to the fact that the boy had been injured. But it is wholly immaterial whether the conductor knew or did not know of the injury when he made the remark, and it would seem from a reading of the opinion that this was made quite clear. The admission of this evidence was held error because of the nature of the conductor's statement. It had no bearing on the issues, was not a part of the transaction, derived no credit from the main fact or act, and did not explain or characterize it in any way.

Petition denied.

NICHOLS & SHEPARD COMPANY v. AUGUST A. SODERQUIST.

October 26, 1899.

Nos. 11,780—(48).

Promissory Note—Joint Maker—Failure of Consideration.

In an action brought against one of the makers of a joint and several promissory note, he may interpose, to defeat recovery pro tanto, the defense that there was a partial failure of consideration, arising out of a breach of a contract of warranty, entered into with all of said makers, as to a part of the property for which the note was given.

Appeal by defendant from an order of the district court for Ren-ville county, Powers, J., sustaining a demurrer to part of the answer. Reversed.

Albert L. Young, for appellant.

Somerville & Olsen, for respondent.

COLLINS, J.

Defendant and one J. A. Soderquist were the makers of two joint and several promissory notes payable to the plaintiff's order. The latter brought an action on these notes against defendant alone. In his answer defendant alleged as a partial defense that a part of the consideration of these notes was the sale and warranty by plaintiff to himself and J. A. Soderquist of a grain separator; that there was a breach of the warranty, in that the separator was wholly worthless and of no value; and that, to the extent of the agreed and stated value of such separator, the consideration for the notes had failed. To this portion of the answer plaintiff's counsel demurred, and the real question is whether the attempted defense is available to defendant in an action brought against him only. The court below held that it was not.

It is, of course, admitted that such a defense could have been interposed for the purpose of preventing full recovery, had the action been brought against both makers of the notes. The allegations now under consideration do not constitute a counterclaim, strictly speaking, but amount to a defense by way of recoupment. It is simply denied that the plaintiff is entitled to recover in so large an

amount as it claims, and the defense is confined to matters directly connected with the transaction which forms the basis of plaintiff's claim. We can see no good reason why the defense should not inure to the benefit of either maker of the notes, unless justice is to be denied merely because the plaintiff has the right to maintain a separate action against one of the makers, and has done so.

The logic of the contention of plaintiff's counsel is that, by instituting separate actions against the makers of joint and several notes, each and all may be deprived of the defense of a partial or total want of consideration. It is well settled in this state that a partial failure of the consideration for a promissory note may be interposed in defense in an action on the note, and this is exactly what defendant is seeking to do here. This defense cannot be taken away from him because it is also available to another maker should he be sued on the note. Counsel for defendant has cited *Durment v. Tuttle*, 50 Minn. 426, 52 N. W. 909. The case is not exactly in point, but the principle is applicable here. See also *Hunt v. Conrad*, 47 Minn. 557, 50 N. W. 614; *McHardy v. Wadsworth*, 8 Mich. 349; *Waterman v. Clark*, 76 Ill. 428.

Order reversed.

A. KLOSS v. C. W. SANFORD.

October 26, 1899.

Nos. 11,805—(108).

Appeal from Justice of the Peace—Certificate.

Held, that the certificate of a justice of the peace on an appeal to the district court on questions of law alone was insufficient to show that a true transcript of all of the evidence given on the trial had been returned, and for this reason the sufficiency of the evidence to sustain the justice's judgment could not be reviewed.

Appeal by defendant from a judgment of the district court for Dodge county, affirming the judgment of a justice of the peace, entered pursuant to the order of Buckham, J. Affirmed.

Littleton & McCaughey, for appellant.

Robert Taylor, for respondent.

COLLINS, J.

Appeal from a judgment entered in district court affirming a justice's judgment in plaintiff's favor in an action of replevin, the appeal to the district court being on questions of law alone.

The only question is as to the sufficiency of the evidence to sustain the judgment, and that question is not before us, because it does not appear that all of the evidence given on the trial in justice's court was returned to the district court. The certificate on appeal to the district court, signed by the justice, was as follows:

"I hereby certify that I have compared the foregoing with the original entries in my docket, and that the same is a full and correct transcript therefrom, and of all the proceedings had before me in said action; that the affidavit, bond, and notice of appeal, together with all the process and other papers relating to the action, and filed with me, or had before me therein, are herewith returned and attached, and numbered from one to ten, inclusive; and that, together with the foregoing transcript, they contain a full, correct, and complete statement of all the proceedings had before me in said action."

Under G. S. 1894, § 4961, the evidence is not properly to be entered upon the justice's docket, nor is there any claim that it was in this instance. The law (section 5070) provides that upon the request of either party the justice, when the appeal is on a question of law alone,

"Shall return to the district court a true transcript of all the evidence given upon the trial."

There is nothing in the certificate in question to show that the return contains all the evidence given upon the trial. It may be that a full, correct, and complete statement of all the proceedings had before the justice was embraced in the return, and yet part or all of the evidence omitted. In *Continental Ins. Co. v. Richardson*, 69 Minn. 433, 72 N. W. 458, this court held a justice's certificate on appeal insufficient to show that all the evidence had been returned. Although it does not so appear from the opinion, that certificate was in the same language as the one now before us. With this con-

dition of the record, the sufficiency of the evidence to sustain the judgment cannot be considered.

Judgment affirmed.

JOHN WELLENDORF v. CHARLES TESCH.

October 26, 1899.

Nos. 11,823—(137).

Adverse Claims—Possession of Part of Land—Special Findings—New Trial.

In an action under the statute to determine an adverse claim to real property, brought by a party who claims to be in possession, it is unnecessary for him to prove that he is in possession of all of the land described in the complaint. He may succeed as to a part of the land, and fail as to the remainder. *Held*, in the action at bar, that the special findings of the jury were supported by the evidence.

Action in the district court for Scott county to determine adverse claims to land. The case was tried before Cadwell, J., and a jury, which made certain special findings, whereupon the court ordered judgment in favor of plaintiff. From an order denying a motion for a new trial, defendant appealed. Affirmed.

F. C. Irwin, for appellant.

H. J. Peck, for respondent.

COLLINS, J.

Action under the statute to determine an adverse claim made to a small tract of land, alleged by plaintiff to be a part of his farm, and to have been owned and to have been in his possession for more than 30 years. In the answer, defendant set up ownership in himself, and, further, that for 20 years prior to the commencement of the action he had not only been such owner, but in actual adverse possession of all of said tract.

Certain issues of fact were submitted to a jury in the shape of four questions. The jury answered the first and second of these in plaintiff's favor, thus finding that a disputed quarter-section corner on the north line of the land was at the spot contended for by

plaintiff, and, further, that the defendant had not been in the actual adverse possession of any part of the tract in controversy for the period of 15 years last past prior to the commencement of the action. The third and fourth questions were not answered by the jury. Upon the return of the special verdict the trial court held that, as the first and second questions had been answered in plaintiff's favor, answers to the third and fourth were unnecessary, and then ordered judgment in favor of plaintiff. Defendant appealed from an order denying his motion for a new trial.

1. Counsel for defendant argues that the court erred when, at the conclusion of plaintiff's case, his motion to dismiss on the ground of failure of proof was denied. This contention is without merit. There might be some room for argument as to whether plaintiff had shown actual possession of every part of the tract in dispute, which, as before stated, is a very small piece of ground; but it had been shown that he was in undisputed and actual possession of a portion of it, and had been for more than 30 years. As the evidence stood when the motion was made, plaintiff had established his right to recover as to a part, if not all, of the disputed tract, and this was sufficient reason for denying the motion to dismiss the case. In an action of this nature it is unnecessary for a plaintiff to prove possession of all of the land described in the complaint in order to recover. He may succeed as to part, and fail in his proofs as to the remainder.

2. We are of opinion that there was evidence sufficient to support the finding by the jury that the quarter-section corner and the stake placed there by the government surveyors were at the place fixed by the plaintiff and his witnesses, although it may be that the weight of the evidence was in opposition. There being a conflict of evidence on this point, it seems quite unnecessary to discuss the matter.

3. We are also obliged to take this view of the proofs in respect to the second finding, to the effect that defendant had not been in possession, actual or adverse, of any part of the tract in controversy, for 15 years immediately prior to the commencement of this action. On the evidence the question of possession by defendant of a part of the tract for a few years past was an open one, and for

the jury to determine. Counsel for defendant is really compelled to admit this in his brief.

4. The court below did not err when it refused to grant a new trial on the ground of newly-discovered evidence. The proposed new witness was defendant's grantor. Defendant simply stated in his moving affidavit that, although he was anxious to secure the witness' attendance at the trial, he did not know where he lived, and could not find him. This showing is wholly insufficient, even if the evidence proffered would affect the result, for it does not appear that defendant exercised the slightest diligence to discover this evidence, or the whereabouts of the witness, prior to the trial. See *Bradley v. Norris*, 67 Minn. 48, 69 N. W. 624.

No other questions have been argued, and the order appealed from stands affirmed.

THOMAS R. COUGHLAN v. ISIDOR LONGINI and Others.

October 30, 1899.

Nos. 11,678—(9).

Mechanic's Lien Statement—Date.

It is not material that a mechanic's lien statement incorrectly states the date of the first or last item, or both, if no one is thereby misled to his prejudice, and the statement is filed in the register's office within 90 days after the true date of the last item.

Same—Variance in Dates.

It is not material that there is a variance between the dates of some of the items stated in a bill of particulars and the true dates.

Omission of Word "Material."

Held, the word "material," omitted in one place in the lien statement, may be supplied from the context by interpretation.

Change of Material.

A contract for furnishing material provided that the material might be changed. Such a change was made shortly after delivery of all the material called for by the contract. *Held*, the 90 days in which to file the lien commenced to run from the date of such change.

Extras.

Where a contract is made to furnish specified materials to be used in the construction of a building, an implied understanding to furnish extras, if called for, may be inferred from the circumstances of the case. In such a case, the extras so furnished and the other material form one continuous account, and the 90 days in which to file the lien statement runs from the date of the last item of the whole account.

Action in the district court for Blue Earth county to foreclose mechanics' liens. The case was tried before Buckham, J., who found in favor of certain lien claimants, but disallowed in part the claim of Forman, Ford & Co. A new trial was granted as to the latter claim, and on the new trial, the court, Severance, J., allowed the claim in full. From orders denying motions for new trials, defendant Northwestern Mutual Life Insurance Company, a mortgagee, appealed. Affirmed.

Edmund S. Durment, for appellant.

Wilson & Van Derlip, Pfau & Pfau, C. L. Benedict, J. A. Flittie, and *Thomas Hughes*, for respondents.

CANTY, J.

This action was brought to foreclose a number of mechanics' liens on a city lot and the building thereon, for the erection of which building the lien claimants furnished labor and material. On the trial the court below found for certain of the lien claimants, and the Northwestern Mutual Life Insurance Company, a subsequent mortgagee, appeals from orders denying a new trial.

1. It appeared by the evidence on the trial that the time of furnishing the first or last item of the labor or material, or both, was not correctly stated in some of the lien statements, but that the true date was a few days before or after the time so stated. Appellant was not in any manner misled or prejudiced by any of those mistakes, and in every instance the last item was actually furnished within 90 days before the lien statement was filed in the office of the register of deeds. Under these circumstances, the mistakes are harmless and immaterial, and the objection is without merit. *Althen v. Tarbox*, 48 Minn. 18, 24, 48 N. W. 1018; *Miller v. Condit*, 52 Minn. 455, 55 N. W. 47; *Lundell v. Ahlman*, 53 Minn. 57, 54 N. W. 936.

2. Neither is there any merit in the objection that the dates of some of the items, as stated in the bill of particulars attached to some of the answers, varied in the same manner from the true dates of the furnishing of the items. Neither is there any merit in the claim that it did not appear in each case that the material furnished was the same material as that stated in the bill of particulars. It was apparently the same.

3. Appellant makes the objection that the lien statement of Macbeth is defective, in this: That the lien claimed is for both labor and material furnished together, and, while the lien statement shows the respective dates of the first and last items of labor, it does not show the dates of the first and last items of material. It is stated therein:

"That this claimant did the work, labor, and material for plumbing and gasfitting the same; that said work, labor, and material were reasonably worth the sum of \$417 * * *; that all of said work, labor, and material so furnished and so performed were so furnished and so performed at the request of said contractor. * * * (3) The time when the first item of such labor and was furnished is August 26, 1895. The time when the last item of such was furnished is November 16, 1895."

The point is that the word "material" does not appear in this third paragraph of the lien statement, and that, therefore, the time when the first and last items of material were furnished does not appear. We are of the opinion that, from the context, the word "material" should be supplied by interpretation after the words "labor and" in said third paragraph. The meaning is clear. Mechanic's lien proceedings are remedial, and are construed liberally in favor of the claimant. The omitted word can and should be supplied in this statement, just as it would be in a deed and in many other written instruments under like circumstances.

4. The lien claimants, Forman, Ford & Co., furnished the glass for the building. Before doing so, their agent signed a written memorandum, which consists simply of the date and the words, "Forman, Ford & Co., ship to E. C. Burdick & Co." Then follows an itemized list of the glass, and then these words, "\$3,100 delivered. Sizes may be changed." Except as hereinafter stated, all the glass furnished under this contract was shipped from Minne-

apolis, August 20, 1895. The evidence does not show when it arrived at Mankato, or at the building, and the lien statement was not filed until December 12 following, or more than 90 days after August 20. But, by reason of changes made in the plans, it became necessary to change the size of some of the pieces of glass. So the contractor requested the claimants to send a man to Mankato to recut these pieces, which was done. The labor of recutting was performed on September 16, within the 90 days. This is sufficient to continue the lien as to all the glass. This court has gone further than it is necessary to go in so holding. See *Scheible v. Schickler*, 63 Minn. 471, 65 N. W. 920.

5. There is still another reason why the lien was preserved as to all the glass. Additional glass was ordered, and was delivered September 23. Where materials are being furnished by a material man for use in the construction of a building, there is, according to custom, usually an implied understanding that extras may be called for, and, if so, will be furnished. Such an implied understanding may be inferred from the circumstances of the case. If it is so inferred, the extras and the material furnished under the principal contract form one continuous account, and the 90 days in which to file the lien statement commence to run from the date of the last item of the whole account; but if, after the furnishing of the last item under the principal contract, more than 90 days have elapsed in which no extras were so furnished, it may be a question whether furnishing a subsequent item of extras will continue the lien for the whole. This disposes of all the questions raised having any merit.

The order appealed from is affirmed.

STATE v. AL COONEY.

October 30, 1899.

Nos. 11,728—(18).

White Earth Indian Reservation—Game and Fish.

While the state authorities have a very extensive jurisdiction over the territory included in the White Earth Indian reservation, in this state, *held*, the tribal Indians on the reservation have, under their treaties with the United States, and the acquiescence of the state for over 30 years, a license to hunt and fish on the reservation, in their usual and traditional manner, in order to procure food for themselves, notwithstanding that the state laws prohibit such fishing and hunting.

Action of replevin in the district court for Becker county. Julia Selkirk intervened, and from an order, Baxter, J., overruling a demurrer to her complaint, plaintiff appealed. Affirmed.

Dickson & Donnelly and *J. N. True*, for appellant.

M. L. Countryman, for respondent.

CANTY, J.

This is an action of replevin for the meat of 14 deer. The action is brought in the name of the state, by authority of the board of game and fish commissioners, under the claim that such meat was in the possession of the defendant five days after the close of the open season, contrary to Laws 1897, c. 221, § 14.

Julia Selkirk intervened, and in her complaint of intervention alleges that at the time of the seizure of the game under the writ of replevin herein, such game was on the White Earth Indian reservation, in this state, and she was in the possession of the same and the owner thereof; that she is an Indian by birth, and a member of one of the tribes of Chippewa Indians dwelling on said reservation, and was, both at the time of the seizure of said game under the writ and at the time she acquired the same, authorized by the United States to trade and barter with the Indians on the reservation; that, during the time when the killing and possession of deer is authorized by the laws of this state, certain tribal Indians lawfully belonging upon the reservation killed the deer thereon, and during such open season bartered the same to her, and that she held the

same for the purpose of bartering the same to the Indians on the reservation, and of supplying the children attending the Indian school thereon with meat; and that no part of the meat was ever removed, or intended to be removed, from the reservation, except by plaintiff under said writ. Plaintiff demurred to this complaint, on the ground that it does not state either a cause of action or a defense, and appealed from an order overruling the demurrer.

In our opinion, the order appealed from should be affirmed. In *Selkirk v. Stephens*, 72 Minn. 335, 75 N. W. 386, we had occasion to go into the history of the White Earth reservation. The territory covered by the reservation ceased to be Indian country in 1855, as it was in that year ceded by the Indians to the United States, and the laws of the United States and of the territory of Minnesota were then extended over the ceded lands, which remained in that condition until after Minnesota was admitted as a state, in 1858, and until 1864, when a new treaty was made with the Indians, and 1867, when another treaty was made, whereby these ceded lands were set apart as a reservation, and the Indians have since resided and maintained their tribal relations upon the same. We are of the opinion that while, under those circumstances, the jurisdiction of the state authorities over the territory covered by this reservation is very extensive, it is not so extensive as to enable the state authorities to destroy or impair the efficacy of the guardianship of the United States government over the Indians, or destroy the effect of the treaties of the United States government with the Indians.

To prohibit the Indian from fishing and hunting, in order to procure food for his own consumption, would undoubtedly impair or destroy such efficacy. He is less vicious, more contented, and more easily controlled when he is allowed to follow his traditional habits. He acquires the habits, and learns to follow the pursuits, of civilized man but slowly. By compelling him suddenly to break off his old habits, and attempting to compel him to form new ones, he becomes a loafer and a vagabond, both dangerous and criminal, who is a menace to the safety and well-being of all the civilized communities in the vicinity of his reservation. The state has, without objection, for more than 30 years, permitted the tribal government to exist within its borders on this reservation, and we are of the

opinion that the state cannot, at this late day, do any act which will practically destroy that government. Though they are both connected with the federal government, the tribal government and the state government are rather foreign to each other, and the rights, as against each other, of governments foreign to each other usually grow up out of acquiescence and tradition. We do not wish to be understood as holding that, as between the state government and the tribal government, tradition and acquiescence will have any such an extensive effect as it will between governments wholly foreign to each other; but still we think such tradition and acquiescence, as between the state government and the tribal government, may have sufficient effect to give the tribe a license to hunt and fish within the boundaries of the reservation, as this peculiar right is practically indispensable to the maintaining of the tribal relation. By the course of things for more than 30 years, it must be inferred that the United States government assumed that the Indians had a right to hunt and fish on the reservation, and the state government has acquiesced in that assumption. It is said in *U. S. v. Holliday*, 3 Wall. 407, 419:

"In reference to all matters of this kind, it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe, this court must do the same."

After 30 years of the mutual recognition, by both the federal and state governments, of the right of these Indians to do something so essential to their tribal relations, we are of the opinion that the courts should follow this mutual recognition, and hold that, while the title to all the wild game is in the state, the Indians have a license to hunt on the reservation in their usual and traditional manner, in order to procure food for themselves. In *Selkirk v. Stephens*, *supra*, we held:

"This limitation of the power of the state does not arise from the fact that the laws of the state are not operative upon this reservation, but it grows out of the personal relations of such Indians to the general government. They are its wards, and under its guardianship and control, and the state may not interfere with or impair the efficacy of such guardianship."

The federal courts have strongly maintained the right of the federal government to prevent any action, by either the state or the private citizen, which will impair the efficacy of the guardianship of the federal government over its Indian wards. See *U. S. v. Holliday*, supra; *U. S. v. Boyd*, 42 U. S. App. 637, 27 C. C. A. 592, 83 Fed. 547; *Cherokee Nation v. State*, 5 Pet. 1; *Worcester v. State*, 6 Pet. 515. The two latter cases are instructive, and much in point here. Georgia was one of the 13 original colonies, and clearly, from the time of the treaty of peace with England (if not from the time of the Declaration of Independence) to the time the United States constitution took effect, Georgia had jurisdiction over the Indians within her borders, if any white man's government had such jurisdiction. But, notwithstanding that, it was held in these two cases that such jurisdiction devolved on the United States government.

But if this game was killed, or was being held, not for personal consumption by the Indians on the reservation, but for sale or disposal to persons other than the tribal Indians, or for shipment off the reservation, then such game is not protected by the license of the Indians to hunt in their traditional manner, and may be seized by the state authorities, whenever this can be done without interfering with the person of the Indian in whose custody or possession the game may be, even though it is so seized on the reservation. Whether the game here in question is protected by such license would ordinarily be a question for the jury, and cannot be determined on this demurrer.

Order affirmed.

COLLINS and BUCK, JJ., concur.

MITCHELL, J. (dissenting).

I am unable to approve this opinion. It seems to me that, in view of the history of this so-called reservation given in *Selkirk v. Stephens*, 72 Minn. 335, 75 N. W. 386, the only logical conclusion is that the state has full and complete jurisdiction of the territory, and that the right of the Indians to kill game upon it is subject to all the game laws of the state. It may be that the remedies of the state for the enforcement of these laws are incomplete, so far as the

persons of the Indians are concerned; but, if so, it is not because the laws do not apply to Indians, but because of the exclusive guardianship of the federal government over tribal Indians on a reservation. This, however, would not stand in the way of the state reclaiming its own property.

I do not see any sufficient basis for the position that by tradition and acquiescence the state has given the Indians a right to hunt and fish unrestricted by its game laws. Game laws were in force when the government placed the Indians on these lands. If the state has in years past failed to enforce these laws as to Indians, the same is true as to white men. But, if there is any such traditional license, it does not extend beyond the right of an Indian to kill game on reservations, irrespective of state game laws, for his own personal consumption as food. It certainly cannot extend to the right to kill or keep game, in violation of the law, for the purpose of making it an article of commerce and sale. It is not the policy of the United States to perpetuate the tribal relation among Indians. On the contrary, its object is to induce the Indians to abandon their tribal relations and adopt the habits of civilized life as soon as possible. The only interest the government can have is to preserve for their Indian wards such rights as are essential to their existence while they do maintain the tribal relation.

In view of the fact that tribal Indians who have not adopted the habits of civilized life are accustomed to depend largely on the fruits of the chase for their food, it may be necessary that they should be allowed to kill game for that purpose on their reservations all the year, irrespective of the closed season under state laws. But there is no necessity that they should be allowed to kill it for the purpose of sale to others. It is a matter of common knowledge that these Indians realize very little from the game which they sell, and what little they do realize is quickly squandered. The idea of these Indians buying game from those who keep it for sale will cause a smile of incredulity on the part of those who know them best; but, even if they do sometimes buy it, it is the Indian who kills and sells the game, or the trader who keeps it for sale, and not the Indian who buys it for food, who is benefited. If an Indian has the money with which to buy venison, he is able to

buy beef or some other article of food with his money. I know of no more effectual method of depleting game, in both Indian reservations and the adjacent country, than to hold that Indians may kill it for purposes of barter and sale, or that traders may buy and keep it for sale, during the closed season. As far as I would be willing to go is that conceding, without deciding, that a tribal Indian has the right to kill game on this so-called "reservation" during the closed season, for consumption as food by himself and family, this is the limit of his right; that the right does not extend to killing or keeping it for sale, even to other Indians.

START, C. J.

I concur in the views of Justice MITCHELL.

WILLIAM S. VENT and Another v. DULUTH TRUST COMPANY.

October 30, 1899.

Nos. 11,768—(104).

Appeal Bond—Insolvency of Principal at Time of Execution.

In an action on an appeal bond given on an appeal from an order denying a new trial, and executed under G. S. 1894, § 6142, *held*: Conceding, without deciding, that it should be presumed that the appellant debtor was insolvent at the time of executing the bond, still the supposition that if a judgment had then been entered, and execution issued thereon and levied on the property of such debtor, it would have made an assignment in insolvency for the benefit of its creditors, and thereby have defeated the levy, is too speculative, and of no avail as a defense to an action on the bond, or in mitigation of the damages to be recovered thereon.

Action in the district court for St. Louis county to recover \$4,293.08 on an appeal bond. The case was tried before Cant, J., and a jury, which rendered a verdict in favor of plaintiffs for \$3,899.99; and from an order denying a motion for judgment notwithstanding the verdict or for a new trial, defendant appealed. **Affirmed.**

Towne & Merchant, for appellant.

Mahon & Agatin, for respondents.

CANTY, J.

This is an action on an appeal bond.

These plaintiffs brought a former action against the Duluth Coffee & Spice Company, and in October, 1895, recovered a verdict therein for the sum of \$5,089.50. A motion for judgment notwithstanding the verdict, and for a new trial, was made and denied. The spice company appealed to this court from the order denying the same, and executed said appeal bond, with the defendant, the Duluth Trust Company, as surety. The bond is a supersedeas bond, under G. S. 1894, § 6142, and is conditioned that the obligors shall pay all costs and charges which may be awarded against the spice company on the appeal and the damages sustained by this plaintiff in consequence thereof, if the order appealed from is affirmed or the appeal dismissed, and shall abide and satisfy the judgment or order which the appellate court may give therein. This bond was executed, approved, and filed October 16, 1895. This court affirmed the order appealed from, and remanded the case. *Vent v. Duluth C. & S. Co.*, 64 Minn. 307, 67 N. W. 70. On May 18, 1896, judgment was entered in the district court, and execution issued and levied on the property of the spice company. On May 21, 1896, the spice company made an assignment under the insolvency law of this state, which assignment vacated the levy of the execution. The insolvent estate was administered, and on October 20, 1898, the plaintiffs were paid their dividend, amounting to \$2,269.65. This action is brought to recover on the bond the balance of plaintiffs' judgment. The jury found for plaintiffs, and the trust company appeals.

The payment of the judgment that may be entered after the motion for a new trial is denied is not the condition of this bond. The plaintiffs must allege and prove facts showing that, on account of being prevented by the stay from entering and proceeding to collect their judgment, they have been damaged, and the amount of that damage. *Friesenhahn v. Merrill*, 52 Minn. 55, 53 N. W. 1024; *Reitan v. Goebel*, 35 Minn. 384, 29 N. W. 6. Appellant contends that under this rule the evidence will not sustain the verdict found

for plaintiffs. There is evidence tending to prove that on October 16, 1895, when the bond was executed, and between that time and November 1, 1895, the spice company had property and assets subject to execution amounting in value to between \$9,000 and \$12,000, and that the value of all the assets of the company at the time of the levy of the execution and at the time of the assignment was but \$3,000. It is admitted that at the latter times the spice company was insolvent, but it does not appear what indebtedness, if any, besides that due these plaintiffs, was owing by the spice company at the time of the execution of the bond.

Appellant contends that the burden was on the plaintiffs to show that the spice company was not insolvent at the time of the making of the bond, and insists that the court should have submitted to the jury the question of such insolvency, and also the question whether the spice company would not have made an assignment for the benefit of its creditors on the entry of judgment and levy of execution, if such judgment had been entered and execution issued at the time the bond was executed. We cannot so hold. Whether or not in that event an assignment would have been made at that time is altogether too speculative and uncertain to be material in this case. It was so held in *Estes v. Roberts*, 63 Minn. 265, 65 N. W. 445. We must take the facts as they did happen, and not speculate as to what might have happened. Such an assignment is a sort of statutory levy of execution for the benefit of all of the creditors. This levy was made within 10 days after plaintiffs levied their execution, so that the levy thereof was released by the assignment, and the effect is the same as if the levy effected by the assignment had been made an hour or a day before the levy by plaintiffs. If the latter were the case, we are clearly of the opinion that plaintiffs would be entitled to recover; but the principle involved is the same, even though the assignment was made within the 10 days after plaintiffs' levy, instead of an hour or a day before it.

We are of the opinion that the trial court was warranted in ruling in favor of the competency of the witnesses who testified as to the amount and value of the property and assets of the spice company at the different times referred to in the evidence. Various

other rulings of the court, of minor importance, are assigned as error, but we find no error in the record.

Order affirmed.

H. E. BAILEY v. JAMES STRACHAN and Others.

77 526
85 306

October 30, 1899.

Nos. 11,895—(100).

Restitution of County Moneys—Action by Taxpayer.

Held, a taxpayer may maintain an action against members of the board of county commissioners to compel them to restore to the county treasury moneys wrongfully and illegally drawn out of the same by them.

Same—Demand.

In July the plaintiff made a demand of the board of county commissioners that they commence an action to compel restitution of the funds so diverted from the county treasury, but did not bring this action until the latter part of the following January. In the meantime a general election had been held, and the time for the January meeting of the board had passed. Conceding, without deciding, that it should be presumed that some of the persons composing the board had changed in the meantime, it was not necessary that plaintiff make a new demand before bringing this action.

Appeal by defendant Strachan from an order of the district court for Wilkin county, C. L. Brown, J., overruling a demurrer to the complaint. Affirmed.

Henry G. Wyvell and Lyman B. Everdell, for appellant.

Edward Valentine and J. W. Mason, for respondent.

CANTY, J.

This is an appeal by one defendant from an order overruling a demurrer to the complaint. The action is brought by a taxpayer against certain persons who had been, and some of whom still are, members of the board of county commissioners. The complaint alleges that defendants, while members of such board, conspired together to allow illegal claims for each other; that they, being a majority of such board, did allow the claims pursuant to such conspiracy, and order them paid out of the county treasury, and the

same were paid accordingly. The character and amount of each of such illegal claims are set out. The prayer for relief is that each of the defendants be adjudged to restore to the county treasury the sum so illegally taken therefrom by them as aforesaid.

Appellant contends that a taxpayer cannot maintain such an action as this. We cannot so hold. It is well settled that a taxpayer may maintain an action to prevent the wrongful diversion of public funds which will increase the amount of his taxes, and we are of the opinion that a taxpayer can maintain an action to compel the restoration of funds which have been illegally taken out of the county treasury, as well as an action to restrain the illegal taking out of such funds. The case of *Land v. McIntyre*, 100 Wis. 245, 75 N. W. 964, is directly in point.

The complaint alleges that at a meeting of the board of county commissioners held on July 22, 1898, plaintiff demanded of said board that they cause an action to be brought against these defendants for the recovery by the county of the money so wrongfully taken out of the county treasury, but that said board refused, and still refuses, to comply with such demand. This action was not commenced until the latter part of the following January, after the time the regular meeting of the board should have been held in that month. The court will take judicial notice that either two or three members of the board were elected in the prior November election, and that their terms of office commenced on the first Monday of January. Appellant contends that we should presume that the personnel of the board changed on that day to the extent of at least two members, and that, as a condition precedent to maintaining this action, it was necessary that plaintiff make a new demand that the new board bring an action for the purposes above stated. Conceding, without deciding, that we should so presume, we cannot hold that such a new demand was necessary. The demand was not made on the persons composing the board, but on the board itself. It is a continuing body, and a change in its membership did not destroy the effect of the demand already made.

Order affirmed.

TOLEF OLSON v. PENNSYLVANIA & OHIO FUEL COMPANY
and Others.

November 1, 1899.

Nos. 11,719, 11,796—(41, 45).

Carrier—Inspection of Car Furnished Shipper.

A carrier owning and transferring a car over its own and connecting lines to a shipper for his use owes to him and his servants who must handle the car the duty of exercising due diligence in inspecting and putting the car in a reasonably safe condition for the proposed service; but, if the car be suitable and safe when it leaves the possession and control of such carrier, it has exercised due care in the premises.

Same—Complaint Defective.

Complaint herein construed, and *held*, that it does not state a cause of action against either of the appellants, because it fails to allege that the car by which the plaintiff, a servant of a shipper, was injured, was in an unsafe condition when it left the respective lines of the appellants, or either of them.

Action in the district court for St. Louis county against Pennsylvania & Ohio Fuel Company, Chicago Great Western Railway Company, Eastern Railway Company of Minnesota, and John Elliot Bowles, as receiver of Duluth Transfer Railway Company, to recover \$7,450 for personal injuries. From orders, Moer, J., and Cant, J., overruling separate demurrers to the complaint, defendants Chicago Great Western Railway Company and Eastern Railway Company of Minnesota appealed. Reversed.

Wm. R. Begg, for Eastern Railway Company of Minnesota, appellant.

Defendant was under no duty to inspect and repair the car as regards plaintiff. *Roddy v. Missouri*, 104 Mo. 234; *Curtain v. Somerset*, 140 Pa. St. 70; *Thomas v. Winchester*, 6 N. Y. 397; *Fowles v. Briggs*, 116 Mich. 425; *Bragdon v. Perkins-Campbell Co.*, 87 Fed. 109; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400; *Davidson v. Nichols*, 11 Allen, 514; *Loop v. Litchfield*, 42 N. Y. 351; *Losee v. Clute*, 51 N. Y. 494; *Necker v. Harvey*, 49 Mich. 517. Plaintiff's injuries were not the proximate result of any breach of duty of de-

fendant. *Fowles v. Briggs*, supra; *Goodlander Mill Co. v. Standard Oil Co.*, supra; *Wharton*, Neg. § 439; *Curtain v. Somerset*, supra; *Texas v. Doherty* (Tex. App.) 15 S. W. 44; *Barkley v. Missouri*, 96 Mo. 367; *Patton v. East*, 89 Tenn. 370; *Stone v. Boston*, 171 Mass. 536; *Willis v. Armstrong*, 183 Pa. St. 184; *Cochran v. Philadelphia*, 184 Pa. St. 565. From the complaint it does not appear that there was any negligence on the part of defendant. *Fay v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 231; *Case v. Chicago*, 64 Iowa, 762; *Indianapolis v. Flanigan*, 77 Ill. 365. The general allegations are controlled by the particular. *Stedman v. City*, 97 Wis. 505. It was not negligence for defendant, so far as plaintiff was concerned, to transport the car in a defective condition. See *Flanagan v. Chicago*, 45 Wis. 98.

D. W. Lawler, Davis, Hollister & Hicks, and *Henry J. Grannis*, for Chicago Great Western Railway Company, appellant.

John Jenswold, Jr., for respondent.

Whoever negligently furnishes for another an imminently dangerous article, about or with which he is to work, and from which injury is likely to and does result to him, is liable therefor. *Moon v. Northern Pacific R. Co.*, 46 Minn. 106; *Closson v. Oakes*, 69 Minn. 67; *Schubert v. J. R. Clark Co.*, 49 Minn. 331. See *Borden v. Daisy*, 98 Wis. 407; *Sheridan v. Bigelow*, 93 Wis. 426; *McGowan v. Chicago*, 91 Wis. 147. Under the general allegation of negligence proof is admissible to establish every point made by defendants against plaintiff's right to recover. *Clark v. Chicago, M. & St. P. Ry. Co.*, 28 Minn. 69; *Keating v. Brown*, 30 Minn. 9; *Ekman v. Minneapolis St. Ry. Co.*, 34 Minn. 24; *Olson v. St. Paul, M. & M. Ry. Co.*, 34 Minn. 477; *Rolseth v. Smith*, 38 Minn. 14; *Rogers v. Truesdale*, 57 Minn. 126; *Weber v. Winona & St. P. R. Co.*, 63 Minn. 66; *Stendal v. Boyd*, 67 Minn. 279. The general allegation is sufficient. *Rogers v. Truesdale*, supra; *Johnson v. St. Paul & D. R. Co.*, 31 Minn. 283; *Birmingham v. Duluth, M. & N. Ry. Co.*, 70 Minn. 474. Defendants had a common duty to inspect and repair. For the common neglect of such duty the tort is joint, and all may be held. *Matthews v. Delaware*, 56 N. J. L. 34; *Downey v. Philadelphia*, 161 Pa. St. 588;

Consolidated v. Keifer, 134 Ill. 481. See *Powers v. Chesapeake & O. Ry. Co.*, 169 U. S. 92; *Moon v. Northern Pacific R. Co.*, *supra*; *Schumaker v. St. Paul & D. R. Co.*, 46 Minn. 39.

Where the facts are peculiarly within the knowledge of defendant, plaintiff is held to a less degree of particularity. *McCauley v. Davidson*, 10 Minn. 335 (418); *Clark v. Chicago, M. & St. P. Ry. Co.*, *supra*; *In re Stevens*, 38 Minn. 432.

START, C. J.¹

The here material facts alleged in the complaint herein are these: The defendant fuel company during all the times stated in the complaint owned and operated a coal dock at the city of Duluth, with railroad tracks which were connected with the main tracks of the Duluth Transfer Railway Company, which were in the control of the defendant Bowles as receiver of such transfer company. During such times the defendant the Chicago Great Western Railway Company was a common carrier of freight and passengers, and owned and operated a railway line in this state, and owned and used a freight car, with others, known as "No. 626." The defendant the Eastern Railway Company of Minnesota was also during such times a like carrier, and owned and operated a railway line from Hinckley to Duluth, in this state. The defendants other than the fuel company were parties to a traffic arrangement by the terms of which all the cars owned, leased, or operated by any of the parties, which were destined for any point on the railway line of any of the other parties to the contract, were to be transported and transferred over the connecting lines of the parties to their point of destination at a reasonable compensation, to be settled for between the parties on the basis of a haul load, and under which the servants of such parties were to handle the cars so transferred and transported.

Pursuant to such arrangement, the Great Western Railway Company delivered its car No. 626 to a connecting carrier to the plaintiff unknown, to be forwarded to the coal dock of the fuel company, to be there loaded with coal. The Eastern Railway Company received the car upon its line, pursuant to the contract, and delivered it to Bowles, the receiver, who, on September 29, 1897, transferred

¹ BUCK, J., took no part.

it to the coal dock, to be there loaded with coal, and returned over the same connecting lines. The fastenings and bearings, upon which hung and was moved one of the sides and doors of the car were at that time, and for a long time prior thereto had been, in a defective and unsafe condition, and insufficient to hold the door in place, and by reason thereof the door was liable to come off its bearings, and injure any person who should be engaged in loading or unloading the car, or working thereabouts, and by reason thereof it was imminently dangerous to all persons working at or about it. The defendants did at all times know of its defective and dangerous condition, or in the exercise of ordinary care and diligence they could have known thereof, but nevertheless they transferred the car, in its defective and dangerous condition, as above stated, to the coal dock, to be there loaded. Defendants were also careless and negligent in this: that they failed and omitted to use proper care in, and made no inspection or repair of, the door, but delivered the car, as above stated, for the purpose of being loaded and handled as herein set forth.

The plaintiff, an employee of the fuel company on its dock, was injured on September 29, 1897, by reason of the defective and dangerous condition of the car. The defendants the Chicago Great Western Railway Company and the Eastern Railway Company each interposed a separate general demurrer to the complaint, and each appeals from an order overruling its demurrer.

The sufficiency of the complaint as showing a cause of action against the Chicago Great Western Railway Company will be first considered. The complaint fairly alleges that it owned the car in question, and consigned it to a shipper, the fuel company, to be loaded and returned, and that it delivered the car to a connecting carrier to be transported to its destination, pursuant to the alleged traffic arrangement. The rule is that, where connecting railroads agree to transport the cars of each over their respective lines, each is under obligation to exercise due diligence in providing reasonably safe cars for the proposed service. Such duty extends to the servants of each of them who must handle the car. *Moon v. Northern Pacific R. Co.*, 46 Minn. 106, 48 N.W. 679. Also, a carrier owning and transferring a car over its own and connecting lines to a ship-

per for his use owes a like duty to the shipper and to his servants who must handle it, and may be exposed to danger from its unsafe and defective condition. *Hoosier v. Louisville*, 131 Ind. 575, 31 N. E. 365. But, if the car be suitable and safe when delivered to the connecting carrier, the party making the delivery has exercised due care in the premises. He is not bound to follow it to its destination, and there inspect and repair it if found defective. Therefore, unless the complaint alleges that the car was in an unsafe and defective condition when it was delivered by the defendant the Chicago Great Western Railway Company to the connecting carrier, it does not state a cause of action against such defendant.

There is no direct allegation in the complaint to the effect that the car was unsafe, or in any manner defective, when it left the possession of this defendant. It is true, as plaintiff claims, that pleadings are to be liberally construed, and that it was not necessary for him to plead his evidence, or to state the precise day or hour when the car became unsafe, but it was necessary for him to allege that the car was unsafe when it left the possession of the defendant. The complaint alleges that the car was at that time (that is, when it was transferred to the coal dock), and for a long time prior thereto it had been, in an unsafe condition. How long? An hour, or a day? That the defendants at all times knew its dangerous condition (that is, at all times after it became unsafe, for they could not have known before), but nevertheless they transferred the car in its defective and dangerous condition, as above stated, to the coal dock, to be there loaded. This last allegation is modified and controlled by the particular facts alleged as to the transfer of the car, which show that it was delivered by the Chicago Great Western Railway Company to the unknown connecting carrier, and was not in its possession thereafter until after the plaintiff was injured.

It is barely possible that, if the question of the sufficiency of this complaint was first challenged in this court after verdict, we might, by argument and inference, spell out the equivalent of an allegation that the car, when it left the possession of the Chicago Great Western Railway Company, was in an unsafe condition, but as against a general demurrer such fact must be distinctly and directly aver-

red. It is not so alleged, and for this reason the complaint does not state a cause of action against this particular defendant.

This conclusion necessarily disposes of the demurrer of the Eastern Railway Company in its favor, for the allegations of the complaint as to it are the same as those we have considered as to the Chicago Great Western Railway Company.

The complaint fails to state a cause of action as to either of the defendants, and each of the orders overruling the demurrers is reversed.

EDWARD HANSON and Another v. INGWALD INGWALDSON.

November 1, 1899.

Nos. 11,736—(35).

Administrator's Sale—Defective Description—Subsequent Correction.

The father of the plaintiffs died intestate, seised of 120 acres of land in section 13, township 101, range 6, and of no other land. The administrator purported to sell and convey the land to the defendant's grantor, but in the inventory filed in the probate court, and in all the proceedings and records had therein with reference to the sale, except the deed, the land was described as being in section 13, township 101, range 5. *Held*, that the sale was void; and, further, that an order of the probate court, made 27 years after the sale, purporting to correct the order of license and the other records, so as to describe the land of which the intestate died seised, was also void.

Tenants in Common—Adverse Possession of Grantee of One.

Where one tenant in common attempts to convey by warranty deed the whole estate in fee, and his grantee records his deed, and by virtue thereof enters upon the estate, and claims and holds exclusive possession of the whole thereof, the possession and claim are adverse to the title and possession of his co-tenant, and amount to a disseisin.

Tenant for Life—Possession.

The possession of a life tenant is never deemed to be adverse to the remainder-man, for the latter has no right of entry or action for possession until the life estate is extinguished.

Tenant for Life—Partition.

Where the interest of the tenant in dower or other life tenant extends to the whole of the land of which partition is sought, the action will not lie against the life tenant, nor can the judgment affect his estate; but, where the life estate extends only to a part of the land, an actual partition or sale thereof may be had, although it affects the life estate.

Action in the district court for Houston county for partition of land. The case was tried before Kingsley, J., who found in favor of defendant; and from an order denying a motion for a new trial, plaintiffs appealed. Reversed.

Duxbury & Duxbury, for appellants.

James O'Brien, for respondent.

START, C. J.

Action for partition of 20 acres of land in section 13, township 101, range 6, in Houston county. The complaint alleges that the father of the plaintiffs, Peter Hanson, died intestate, seised of the land, and that each of the plaintiffs now owns an undivided one-fourth, and the defendant the remaining undivided one-half, thereof. The answer admits that Peter Hanson died seised of the land, and alleges that the defendant has acquired the whole title thereto through an administrator's sale thereof to his grantor, and also by adverse possession. The trial court made findings of fact in favor of the defendant as to both defenses, and ordered judgment for him. The plaintiffs appealed from an order denying their motion for a new trial.

1. As to the first defense, the plaintiffs' assignments of error may all be considered under the general question: Was the evidence competent and sufficient to support the findings of the trial court to the effect that the whole premises were duly sold by the administrator of Hanson to the defendant's grantor?

The father of the plaintiffs, Peter Hanson, died intestate, January 24, 1868, seised of no other land except the north 120 acres of the northeast $\frac{1}{4}$ of section 13, township 101, range 6, in the county of Houston, of which the 20 acres here in controversy are a part. He left, him surviving, his widow and four minor children, two of whom died unmarried, intestate, and without issue. The widow is still living, and in 1870 she married the defendant's grantor, Knud

Halgrimson. The plaintiffs are now the only surviving children, and each of them became of legal age more than 15 years prior to the commencement of this action, in June, 1898. On January 7, 1871, Asle Swenson was duly appointed administrator de bonis non of the estate; and on May 30, 1871, as such administrator, he executed and delivered a deed, which was duly recorded on that day, of the 120 acres of which his intestate died seised, subject to the dower rights of the widow, to Knud Halgrimson, in consideration of \$1,200. This deed correctly described the property, and recited all of the jurisdictional steps necessary to make a valid administrator's sale of the land. On March 4, 1875, Halgrimson and wife, the widow of Hanson, by a joint warranty deed, dated on that day, and duly recorded on December 6, 1875, purported to convey to the defendant herein the whole title to the 20 acres here in question in consideration of \$500, which he paid to them; and thereupon, without any knowledge or notice in fact of any defects in the administrator's sale affecting his title, he entered into possession of the premises, under his deed, on March 4, 1875, and has been ever since in the actual and exclusive possession of the whole thereof.

There is no substantial dispute between the parties as to the foregoing facts, but the records of the probate court received in evidence show that in the inventory of Hanson's estate, and in all other records and papers relating to the sale, except the administrator's deed, the land was described as situate in section 13, township 101, range 5, instead of range 6. After the commencement of this action, but before the trial thereof, the administrator of Hanson's estate petitioned the probate court to correct such records and papers by substituting range 6 for range 5 in the description of the land wherever it occurred therein. The probate court granted the petition. The trial court found that in all of the proceedings in the probate court it was the land actually owned by Hanson at the time of his death which was intended to be described therein, and to be and was actually sold, and that range 5, instead of range 6, was inserted in the description of the land by mistake. The evidence justifies such finding, but the question here is not what the unexecuted intention was. The question is, does it appear from the records that the administrator was licensed to sell the north 120

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acres of the northeast $\frac{1}{4}$ of section 13, township 101, range 6, of which Hanson died seised?

It appears from the records that the land the administrator was licensed to sell was particularly described therein as being six miles east of that owned by Hanson; that is, in range 5, instead of range 6. It is to be noted that there is no indefiniteness in this description, for it is specific, and necessarily negatives any inference that it includes the land in question. The defendant, however, claims that, in the petition for license, order, notice of sale, and confirmation, the land is described as that of which Peter Hanson died seised, and that the particular description must be rejected as false; and that, if this be done, the identity of the land is clearly established by the general description. The case of *Buntin v. Root*, 66 Minn. 454, 69 N. W. 330, is relied on in support of this proposition. The case cited, however, is not in point; for in that case the particular description of the land in the order of license was simply indefinite, but was made certain by the recitals therein. In this case the description of the land the administrator was licensed to sell was definite and certain, and clearly identified land which the deceased never owned, and no other. If this particular description were rejected, as suggested, the records would not identify any land whatever. The petition for license is entitled, "In the matter of the estate of Peter Hanson, deceased," and states the amount of the personal estate, the disposition thereof, the amount of the unpaid debts, and that the "deceased died seised of the following described real estate." Then follows a specific description of the north 120 acres of the northeast $\frac{1}{4}$ of section 13, township 101, range 5. The petition contains no other description or designation of the land to be sold. The license, so far as here material, was in these words:

"In the matter of the application of Asle Swenson for authority to sell the real estate of said Peter Hanson for the payment of his debts. Pursuant to an order of this court made in said matter on the 21st day of January, A. D. 1871, the petition of Asle Swenson, praying for license to sell all of the real estate whereof said Peter Hanson died seised, was this day heard and considered. * * * It is ordered that said Asle Swenson be, and he is hereby, licensed and authorized to sell the following described lands, viz.: The

north $\frac{1}{2}$ of northeast $\frac{1}{4}$ of section 13, Town 101, range 5, and north $\frac{1}{2}$ of south $\frac{1}{2}$ of northeast $\frac{1}{4}$ of section 13, Town 101, range 5."

If the particular description of the land be stricken from this license, it is obviously a nullity; but with the particular description it authorizes the administrator to sell a specific 120 acres in range 5, and no other. It follows that the administrator was never licensed to sell the 120 acres in range 6, of which his intestate died seised, and therefore the attempted sale of the latter by the administrator was not simply irregular, by reason of a clerical mistake, but absolutely void. It also follows from this proposition, as a simple corollary, that the attempt of the probate court to correct the records, so far as to substitute in the order of license land in range 6 for land in range 5, was a nullity. *Kurtz v. St. Paul & D. R. Co.*, 65 Minn. 60, 67 N. W. 808. We have reluctantly reached the conclusion that the administrator's sale was void, for there are no equities to support the plaintiffs' claim.

2. This brings us to the question whether the defendant has acquired title to the land in question by adverse possession. He acquired, by the deed under which he entered into possession of the land, the life estate of the widow of Hanson in an undivided one-third thereof; also an undivided interest in fee,—the plaintiffs concede that it was an undivided one-half. He was therefore a tenant in common with the plaintiffs, who claim that his possession was not adverse as to them, because the possession of one tenant in common is not to be presumed to be adverse to his co-tenants. Such is the general rule; but where one tenant in common attempts to convey the whole estate in fee, by warranty deed, and his grantee records his deed, and by virtue thereof enters upon the estate, and claims and holds exclusive possession of the whole thereof, the entry and claim must be deemed adverse to the title and possession of his co-tenant, and amount to a disseisin. *Ricker v. Butler*, 45 Minn. 545, 48 N. W. 407; *Freeman*, Cot. § 224. Such was this case, and the defendant would now be the sole owner of the whole of the premises in question, except for the life estate of the widow in an undivided one-third thereof.

When the defendant entered under this deed, the plaintiffs in fact owned an undivided one-half of the premises, subject to the

widow's dower right, a life estate in an undivided one-third of the whole premises, or a life estate in an undivided one-sixth of their moiety, leaving them an undivided one-third of the whole not subject to dower. As to this undivided one-third, they could have asserted their right to it at any time after they reached their majority, which was more than 15 years before the commencement of this action; hence, as to this third, the action is barred,—that is, the defendant has acquired title thereto by adverse possession. But the undivided one-sixth of the land which is still subject to the life estate, as against the plaintiffs, stands upon a different basis. As to it they are reversioners, and the defendant a tenant for the life of another. The possession of the tenant for life is never deemed to be adverse to the remainder-man, for the latter has no right of entry or action for possession during the life term. Therefore this action is not barred as to such undivided one-sixth. *Allen v. DeGroodt*, 98 Mo. Sup. 159, 14 Am. St. Rep. 635, notes.

It follows that the plaintiffs own in fee an undivided one-sixth of the land, subject to the life estate, and that the defendant owns the life estate and an undivided five-sixths of the land in fee.

3. It is further claimed that the plaintiffs cannot have partition as to their undivided interest because the widow is still living, and the claim of the tenant in dower is still in force. It is true that, where the interest of the tenant in dower or other life tenant extends to the whole of the land of which partition is sought, the action will not lie against the life tenant, nor can the judgment affect his estate. *Smalley v. Isaacson*, 40 Minn. 450, 42 N. W. 352. In such case, there is no necessity for disturbing the tenant in dower or other life tenant; for there can be an actual partition, as between the reversioners, by each taking his share in severalty, subject to the life estate, or the whole may be sold subject to such estate; hence the statute (G. S. 1894, § 5778) expressly provides that a judgment in partition shall not affect tenants in dower, or by curtesy or for life, to the whole of the property which is the subject of the partition. But, where the life estate extends only to a part of the land to be partitioned, an actual partition or sale thereof may be had, although it affects the life estate. It is not necessary, in such a case, that the plaintiff should have a present right of possession.

G. S. 1894, §§ 5770, 5777, 5792; Cook v. Webb, 19 Minn. 129 (167); Bonham v. Weymouth, 39 Minn. 92, 38 N. W. 805; Smalley v. Isaacson, *supra*.

The trial court erred in directing judgment for the defendant as to the entire interest in the premises, and the order denying plaintiffs' motion for a new trial must be reversed, and a new trial granted, as to the undivided one-sixth thereof. So ordered.

WILLIAM A. ROGERS v. TOWN OF AITKIN and Others.

November 1, 1899.

Nos. 11,770—(113). -

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188	46

Highway—Evidence of Statutory User.

Evidence considered, and *held* that it is sufficient to sustain a finding to the effect that the highway here in question was established by a statutory user.

Appeal by plaintiff from a judgment of the district court for Aitkin county, entered pursuant to the findings of Holland, J., dismissing the action on the merits. Affirmed.

True & Wetherby, for appellant.

F. W. Hall, for respondents.

START, C. J.

This is an action for a perpetual injunction restraining the defendant town and its supervisors from entering upon or interfering with the land described in the complaint. The defense is that the premises were subject to the easement of a highway. The cause was tried by the court without a jury, and judgment on the merits in favor of the defendants was entered, from which the plaintiff appealed.

The sole question on this appeal is whether the evidence justified the finding and conclusion of the trial court to the effect that the locus in quo was a public highway. It must be conceded that the records as to the laying out of the highway did not, standing alone, establish its existence; but we are of the opinion that the evidence taken as a whole was sufficient to sustain a finding to the effect that

the highway was established by a statutory user. G. S. 1894, § 1832. Evidence was given on the trial tending to show that in 1881 the then town supervisors attempted to lay out the highway in question, but, as suggested, the record of their acts is defective; that, immediately following such attempt, the road was surveyed and opened, and has at all times since been known, and continuously used and traveled, as a public highway, and that public work has been expended thereon when necessary. This evidence was sharply in conflict with that given on behalf of the plaintiff, whose witnesses on the issue materially exceeded in number those of the defendants. The evidence on the part of the defendants was sufficient, if satisfactory to the trial court, to establish a public highway by a statutory user. The credibility of the witnesses and the weight of the evidence were matters for the trial court, and its decision is sustained by the evidence.

Judgment affirmed.

STATE v. JOHN LINDQUIST.

November 1, 1899.

Nos. 11,771—(24).

Intoxicating Liquor—Sale in Minneapolis.

The charter provisions of the city of Minneapolis, authorizing its city council to license and regulate the sale of intoxicating liquors within its limits, and the ordinance enacted pursuant to such authority, were not repealed by Laws 1887, c. 6, regulating the sale of intoxicating liquors.

Appeal by defendant from a judgment of the municipal court of Minneapolis, whereby he was convicted of selling intoxicating liquor without a license, and sentenced to be imprisoned in the city workhouse for the term of 90 days. Affirmed.

David B. Johnson and *John J. McHale*, for appellant.

Frank Healy and *H. E. Dickinson*, for respondent.

START, C. J.

The defendant was convicted, on his plea of guilty, in the municipal court of the city of Minneapolis, of the offense of selling spirit-

uous liquor without license, contrary to the ordinance of the city. Thereupon it was adjudged that he be imprisoned in the workhouse of the city for the term of 90 days. He appealed from the judgment.

The assignments of error present but a single question. It is this: Did the municipal court have jurisdiction to pronounce the judgment? The answer to this question depends on whether the charter and ordinance of the city of Minneapolis relating to the liquor traffic in the city were repealed by Laws 1887, c. 6, known as the "High-License Law." The contention of the defendant is that they were. The charter provisions are to the effect following: The city council shall have full power and authority to make, ordain, publish, enforce, alter, amend, or repeal ordinances of the city for the suppression of vice and intemperance; and for these purposes the said city council shall have authority, by such ordinances, first, to license * * * all persons vending, dealing in, or disposing of spirituous, vinous, fermented, or malt liquors; * * * and any person who shall vend, deal in, or dispose of spirituous, vinous, fermented, or malt liquors, within the present or future limits of said city, except when licensed by the city council of said city, shall be subject to all the pains and penalties provided by G. S. 1878, c. 16 (G. S. 1894, c. 16), for selling spirituous, vinous, fermented, or malt liquors without a license, as well as to any punishment provided by any ordinance by the city council of the city of Minneapolis, as in this charter provided. These provisions were in force when Laws 1887, c. 6, was enacted, sections 5 and 8 of which are in these words:

"Sec. 5. The provisions of this act shall apply to all cities and villages in this state incorporated under general or special law, and to every other municipal corporation or quasi corporation in this state, whether or not said municipal corporations have the right by general or special charter or general or special laws to grant licenses for the sale of intoxicating liquors or to regulate said sale through or by any council or officer of the same anything in the charter of any municipal corporation in this state to the contrary notwithstanding."

"Sec. 8. All acts or parts of acts inconsistent with this act are hereby repealed."

Now the claim of the defendant is briefly this: Before the passage of Laws 1887, c. 6, the punishment for selling intoxicating liquors prescribed by G. S. 1878, c. 16, § 4, was by a fine not exceeding \$100, or by imprisonment for not more than 60 days; and for selling contrary to the ordinance of the city of Minneapolis (for a violation of which the defendant was convicted) the punishment was a fine of not more than \$100, or by imprisonment not exceeding 90 days. But by Laws 1887, c. 6, § 4 (G. S. 1894, § 2029), the offense of selling liquor contrary to that act is punished by both fine and imprisonment, not exceeding \$100 fine and 90 days' imprisonment,—a penalty beyond the jurisdiction of justices of the peace and municipal courts to enforce. Therefore the provisions of Laws 1887, c. 6, are inconsistent with the provisions of the city charter and ordinance here in question; hence they, as well as G. S. 1878, c. 16, § 4, were repealed by it. *State v. Anderson*, 47 Minn. 270, 50 N. W. 226.

This claim is specious, but fallacious; for it ignores the fact that the charter of the city of Minneapolis provides that, if any person sells any intoxicating liquor within the city limits except when licensed by the city council, he shall be subject, not only to the penalties provided by G. S. 1878, c. 16 (G. S. 1894, c. 16), but also to the penalties provided by any ordinance of the city. It would seem that, without this last provision, the city would have the power to provide by ordinance a penalty for selling liquor without a license within its limits. *State v. Ludwig*, 21 Minn. 202; *State v. Lee*, 29 Minn. 445, 13 N. W. 913. A change in the penalty provided by general laws for selling liquor contrary to such laws is in no manner inconsistent with the special charter provisions authorizing the city council of Minneapolis to license, regulate, and control the traffic within the city limits by ordinance, and to enforce it by appropriate penalties. Therefore the charter provisions and ordinance in question were not repealed by the general law of 1887, regulating the sale of intoxicating liquors. See *State v. Harris*, 50 Minn. 128, 52 N. W. 387, 531. The leading purpose of this general law was to exact a higher license fee for selling intoxicating liquor throughout the state. To effectuate this purpose, it was necessary to make the law applicable to municipalities organized under spe-

cial charters as well as to the balance of the state; hence the necessity of sections 5 and 8 of the act which we have quoted. These sections, therefore, cannot be construed as repealing the then existing charter provisions of the cities of the state authorizing them to regulate the liquor traffic within their corporate limits. They operate to repeal only such charter provisions as are inconsistent with the general law; for example, a charter provision authorizing a city to exact a less license fee than that provided for by the general law, or exempting it entirely from the operation of the general license law of the state.

We therefore hold that the charter provisions of the city of Minneapolis, authorizing its city council to license and regulate the sale of intoxicating liquor within its limits, and the ordinance enacted pursuant to such authority, were not repealed by Laws 1887, c. 6, and that they are still in force.

Judgment affirmed.

ANDREAS UELAND v. ALECK E. JOHNSON and Others.

November 1, 1899.

Nos. 11,779—(70).

Judgment—Service of Summons upon Wrong Person.

Action to enforce stockholders' liability. The summons named John Lynch as a defendant; and the complaint alleged that he was a stockholder of the corporation. The summons was personally served on John M. Lynch, the appellant herein, who was never a stockholder, and in fact was not the person upon whom the summons ought to have been served. He, however, failed to appear, and judgment was entered against him by default. *Held*, that the judgment was valid.

Vacating Judgment upon Terms.

The trial court made its order granting appellant's motion to vacate the judgment and permit him to answer on condition that he pay \$75 costs. *Held*, that the court did not abuse its discretion in imposing the condition.

Action in the district court for Hennepin county by plaintiff as receiver of Washington Bank against Aleck E. Johnson, John Lynch, and others to enforce the liability of defendant stockholders

in the bank. The summons was served on John M. Lynch, who failed to appear, and judgment was entered against John Lynch. From an order, McGee, J., granting the motion of John M. Lynch to vacate the judgment and for leave to answer on condition of payment of \$75 costs, he appealed. Affirmed.

John M. Lynch and Charles J. Berryhill, for appellant.

The service and subsequent proceedings, including the judgment, were absolutely void. The statutes (G. S. 1894, §§ 5231, 5194, 5199) do not warrant institution of an action against one John Lynch by name in the summons and complaint, and service on a different John Lynch, and judgment against the latter. *Savings Bank of St. Paul v. Authier*, 52 Minn. 98, is the converse of this case. The fallacy lies in confusing identity of names with identity of persons. *Ryan v. Tomlinson*, 31 Cal. 11, 16. To ascertain the names of the parties the statute necessarily refers us to the record, and by it alone must the parties be disclosed. See *Lamping v. Hyatt*, 27 Cal. 99. Judgment cannot be rendered by default against one not a party to the record. 6 Enc. Pl. & Pr. 12, 13; 1 Wait, Pl. & Pr. 473, 511. This is not the case of a misnomer merely. *Guinard v. Hey-singer*, 15 Ill. 288. See *Casper v. Klippen*, 61 Minn. 353; *Walley v. M'Connell*, 13 A. & E. (N. S.) 903; *Fischer v. Hetherington*, 11 Misc. (N. Y.) 575; *McGill v. Weill*, 19 Civ. Proc. 43; *Gardner v. Kraft*, 52 How. Pr. 499; *Hoffman v. Fish*, 18 Abb. Pr. 76; *Farnham v. Hildreth*, 32 Barb. 277; *Williams v. Van Valkenburg*, 16 How. Pr. 144. If the judgment was not void, the proceedings were so irregular as to render it abortive. *Casper v. Klippen*, supra.

It was an abuse of discretion to make vacation of the judgment conditional on payment of \$75 costs. It was plaintiff's duty to get the right party into court. *Dimond v. Minnesota Savings Bank*, 70 Minn. 298. G. S. 1894, § 5267, is not applicable. Costs are the creature of statute. *Kroshus v. County of Houston*, 46 Minn. 162. Section 5506 does not authorize costs exceeding \$10. "Terms" and "costs" are not synonymous. *Brown v. Brown*, 37 Minn. 128.

A. Ueland, for respondent.

START, C. J.

This action was brought in the district court of the county of

Hennepin against John Lynch and others to enforce their respective liability as stockholders of the Washington Bank, an insolvent corporation. The complaint alleged that the defendant John Lynch (not John M. Lynch) was the owner of six shares of the capital stock of the bank, and other facts sufficient to constitute a cause of action against him. The summons named John Lynch as defendant, and recited that the complaint was on file in the clerk's office. It was personally served on the appellant herein, John M. Lynch, on February 25, 1897. He did not appear, and judgment was entered against the defendant John Lynch, by default, January 25, 1898. On March 25, 1899, the appellant moved the district court to set aside the judgment, and for leave to answer the complaint. The proposed answer denied that the appellant was the John Lynch named as one of the defendants in the action, and denied that he was, or ever had been, a stockholder of the Washington Bank. The trial court made its order setting aside the judgment, and granting the appellant leave to answer, on payment of \$75 costs. He appealed from the order.

The appellant's first claim is that the service of the summons and the judgment are absolutely void as to him because he is not the John Lynch named in the summons and complaint as defendant.

The John Lynch named in the action as defendant is admittedly the person who is charged in the complaint with the ownership of six shares of the stock of the bank. Whether the appellant is that person is the very issue which he tendered by his answer. The summons was personally served upon him, and he was thereby advised that the plaintiff claimed that he was the John Lynch who owned the stock, as charged in the complaint, and he was thereby called upon to come into court and meet the issue. He made default, and the court by its judgment necessarily determined the issue against him. He now asks the court to relieve him of his default, and permit him to answer and meet the proposed issue,—a proceeding wholly illogical and inconsistent if the judgment is void. The judgment was neither void nor irregular. *Gorman's Case*, 124 Mass. 190. The cases cited and relied upon by the appellant are not in point, for they are cases where the name of the person upon

whom the process was served and the name of the defendant therein were not the same,—for example, where a summons against John Brown was served on John Smith. Whether the cases cited state the law correctly, we need not stop to inquire, for they are radically different in their facts from this case. The summons in this case named John Lynch as the defendant, and it was personally served on John M. Lynch, the appellant. The omission of the middle initial letter in the name was immaterial. He had no right to assume that some other John Lynch was intended, and it was his own fault that he did not come into court in answer to the summons, and contest the allegations of the complaint that he was a stockholder,—a question upon which his identity depended.

The judgment being valid, his motion was addressed to the discretion of the trial court, and the order appealed from must be affirmed, unless the court erred in imposing terms as a condition of permitting him to answer. The appellant claims that in no event could the costs imposed exceed \$10, as provided by G. S. 1894, § 5506. They were not imposed under this section, which refers to costs which may be allowed to the prevailing party upon a decision of a motion or demurrer. It is perfectly evident from a reading of the order that the payment of the \$75 as a condition of answering was imposed as terms under the provisions of G. S. 1894, § 5267. The fact that the court labeled the amount to be paid as “costs” is not significant.

Lastly, the appellant claims that the amount imposed was excessive, and therefore an abuse of discretion on the part of the court. The amount is 10 per cent. of the judgment, and under ordinary circumstances would be excessive. But this is not an ordinary case, for the appellant’s negligence in failing to appear in response to the summons, and his delay in applying to the court to be relieved from his default, are great and unexcused. The opening of the judgment against the stockholders, as against him, will necessarily be attended with costs and expenses by the receiver, which might have been avoided, except for appellant’s negligence. We are not prepared to hold that the trial court abused its discretion in imposing the condition.

Order affirmed.

INDEX.

ACCOUNT.

See Application of Payment, 24; Guardian and Ward, 70.

ACTION.

Statute Authorizes an Action to Determine a Particular Specified Claim, as well as All Claims—G. S. 1894, § 5817—Walton v. Perkins and Knudson v. Curley Overruled—Possession of Plaintiff Immaterial when Answer Is in Effect a Cross Action.

—Palmer v. Yorks, 20.

Suit in Equity by One Executor against His Co-Executor.

—Peterson v. Vanderburgh, 218.

Action to Determine Boundary Lines Includes Adverse Claims—Laws 1893, c. 68.

—Benz v. City of St. Paul, 375.

ADVERSE CLAIMS.

G. S. 1894, § 5817—Statute Authorizes an Action to Determine a Particular Specified Claim, as well as All Claims—Walton v. Perkins and Knudson v. Curley Overruled—Possession of Plaintiff Immaterial when Answer Is in Effect a Cross Action.

—Palmer v. Yorks, 20.

Conveyance in Fraud of Creditors—Judgment Sole Evidence of Debt—Successor of Judgment Creditor not Authorized to Question Conveyance.

—Hoerr v. Melhofer, 228.

Laws 1893, c. 68—Determination of Boundary Lines—Statute Applies to Determination of Adverse Claims.

—Benz v. City of St. Paul, 375.

Plaintiff Claiming Possession May Succeed as to Part of Land to Which He Proves to Be in Possession.

—Wellendorf v. Tesch, 512.

See Redemption, 88.

ADVERSE POSSESSION.

Adverse Possession by Grantee of One Tenant in Common under Conveyance of Whole Estate in Fee—Tenant for Life—Remainder-Man.

—Hanson v. Ingwaldson, 533.

AFFIDAVIT.

Change of Venue under Laws 1895, c. 28—Affidavit of Residence.

—State ex rel. v. District Court of Meeker Co., 302.

See New Trial, 512; Title, 124.

ALIMONY.

See Divorce, 67.

ANSWER.

See Pleading, 20, 438, 474.

APPEAL.

If point Urged upon Argument by Appellant Is not Made in His Printed Brief, the Court, under the Rule, Will not Consider It, Unless Voluntarily Discussed by the Respondent.

—Cutting v. Weber, 53.

Challenge to Juror for Cause—Decision not Reviewable upon Appeal.

—Bennett v. E. W. Backus Lumber Co., 198.

Action upon Bond under G. S. 1894, § 6142—Insolvency of Maker—Probable Defeat of Levy by Assignment for Benefit of Creditors Too Speculative.

—Vent v. Duluth Trust Co., 523.

See Justice of the Peace, 510.

APPLICATION OF PAYMENT.

Continuous Account of Principal with Successive Agents—Application of Payments to Principal.

—Hall v. U. S. Fidelity & Guaranty Co., 24.

ARBITRATION.

Arbitration as to Amount of Loss—Fire Insurance—Refusal to Arbitrate.

—Schrepfer v. Rockford Insurance Co., 291.

ASSESSMENT.

Assessment in Mutual Insurance Company for Expenses of Receivership—Error in Computation—Collateral Attack.

—Langworthy v. C. C. Washburn Flouring Mills Co., 256.

ASSESSMENT FOR LOCAL IMPROVEMENT.

City of St. Paul—Payment of Assessment—Reassessment against Same Lots because of Nonpayment by Others—Proportionate Share of Benefit—Constitution.

—State ex rel. v. District Court of Ramsey Co., 248.

City of St. Paul—Action to Test Validity of Sale—Statute of Limitations—Notice of Sale—Sale for Less than Judgment, Interest, and Costs.

—London & Northwest American Mortgage Co. v. Gibson, 394.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

Garnishment of Assignee of Corporation—Armour Packing Co. v. Brown Followed.

—Devlin v. James McMillan & Co., 137.

ASSIGNMENT FOR BENEFIT OF CREDITORS—Continued.

Removal of Assignee because of Nonpayment to Surety Company of Premium upon His Bond—Laws 1895, c. 295—Order of Removal—Practice.

—American Surety Co. v. Nelson, 402.

Assignment for Benefit of All Creditors without Requiring Releases, Void as Assignment under Laws 1881, c. 148, but Valid as Common-Law Assignment under Laws 1876, c. 44—Instrument Must Show on Its Face Execution under Act of 1881—Assignee Must Be Resident Freeholder under Act of 1876—Garnishment of Assignee.

—Lanpher v. Burns, 407.

See Insolvency, 523.

BAILMENT.

Specified Warehouse Receipt for Grain a Contract of Bailment, not of Sale.

—State v. Barry, 128.

BANK.

Verdict Excessive for Services Rendered by Director to Bank.

—Forster v. Columbia National Bank, 119.

Loan to Officer of Second Bank by Crediting Account of That Bank—Fraud of Officer and Cancellation of Credit—No Estoppel against Lender.

—Selover v. First National Bank, 140.

Situs for Taxation of Certificate of Deposit Representing Unpaid Dividend.

—State v. Willard, 190.

See Check, 267.

BANKRUPT.

Transfer of Certificate of Membership of Bankrupt in Chamber of Commerce—By-Laws of Chamber—Objection by Creditor Whose Debt was Discharged in Bankruptcy Proceedings.

—State ex rel. v. Chamber of Commerce, 308.

BICYCLE.

Riding Bicycle between Street-Car Tracks.

—Gagne v. Minneapolis Street Ry. Co., 171.

BOND.

Removal of Assignee for Benefit of Creditors because of Nonpayment to Surety Company of Premium upon His Bond.

—American Surety Co. v. Nelson, 402.

Bonds for Floating Debt of Municipal Corporation—Laws 1899, c. 50, Constitutional.

—Alexander v. City of Duluth, 445.

BOND—Continued.

Action upon Appeal Bond under G. S. 1894, § 6142—Insolvency of Principal at Time of Execution no Defense—Probable Defeat of Levy upon Execution by Assignment for Benefit of Creditors Too Speculative.

—Vent v. Duluth Trust Co., 523.

Character of Sheriff's Bond.

—Hull v. Chapel, 159.

See Insolvency, 59.

BOOKS OF ACCOUNT.

Offer of Books of Owner to Prove Value of Insured Property Destroyed by Fire—G. S. 1894, § 5738.

—Coleman v. Retail Lumbermen's Insurance Assn., 31.

BOOM COMPANY.

See Log, 153.

BOUNDARY.

Action to Determine Boundary Lines—Laws 1893, c. 68—Statute Applies to Determination of Adverse Claims—Judgment Must Locate Boundary Lines.

—Benz v. City of St. Paul, 375.

BROKER.

Action upon Contract for Commission for Obtaining Purchaser of Real Estate.

—Harriott v. Holmes, 245.

See Insurance (Fire), 428.

BUILDING AND LOAN ASSOCIATION.

Exemption of Building Associations from Usury Laws Constitutional

—Finding that Plaintiff Is Such Association.

—Zenith Building & Loan Assn. v. Helmbach, 97.

CASES DISTINGUISHED.

Leonard v. Green, 30 Minn. 496.

—See Husband and Wife, 282.

Rochester Ins. Co. v. Martin, 13 Minn. 54 (59).

—See Promissory Note, 256.

Salko v. St. Paul City Ry. Co., 67 Minn. 8.

—See Street Railway, 179.

Security Trust Co. v. Von Heyderstaedt, 64 Minn. 409.

—See Sale, 394.

CASES FOLLOWED.

Armour Packing Co. v. Brown, 76 Minn. 465.

—See Garnishment, 137.

Clark v. Butts, 73 Minn. 361.

—See Judgment, 54.

CASES FOLLOWED—Continued.

Cruikshank v. St. Paul F. & M. Ins. Co., 75 Minn. 266.

—See Judgment notwithstanding Verdict, 442.

Hicks v. Stone, 13 Minn. 398 (434).

—See New Trial, 189.

State v. Stearns, 72 Minn. 200.

—See Taxes, 433.

CASES OVERRULED.

Knudson v. Curley, 30 Minn. 433.

—See Adverse Claims, 20.

Walton v. Perkins, 28 Minn. 413.

—See Adverse Claims, 20.

CERTIFICATE.

Transfer of Certificate of Membership of Bankrupt.

—State ex rel. v. Chamber of Commerce, 308.

Tax Certificate under Laws 1881, c. 135—Failure to Give Highest Bid for Each Lot.

—*Davis v. Carlin*, 472.

Certificate of Justice of the Peace upon Appeal—Transcript of Evidence.

—*Kloss v. Sanford*, 510.

CERTIFIED CASE.

See Water, 317.

CERTIORARI.

See Assessment for Local Improvement, 248.

CHAMBER OF COMMERCE.

Transfer of Certificate of Membership of Bankrupt—Mandamus.

—State ex rel. v. Chamber of Commerce, 308.

CHANGE OF VENUE.

Upon Compliance with Laws 1895, c. 28, by Defendant, Place of Trial Is ipso facto Changed—Retention of Case by Court—Mandamus from Supreme Court—Affidavit of Residence Sufficient.

—State ex rel. v. District Court of Meeker Co., 302.

CHARGE TO JURY.

Injury Caused by Concurring Negligence of Both Parties.

—*King v. Chicago, Milwaukee & St. Paul Ry. Co.*, 104.

Action for Broker's Commission—Error to Charge that Interest of Defendant in Result and Temptation to Give Testimony Favorable to Himself Can Be Considered in Weighing His Testimony.

—*Harriott v. Holmes*, 245.

CHARGE TO JURY—Continued.

Failure of Husband or Wife to Consent to Examination of Other Spouse—G. S. 1894, § 5602.

—National German American Bank v. Lawrence, 282.

Obtaining Money by False Representations—Representation Need not Be Oral.

—State v. Southall, 296.

Gift—Fact of Delivery.

—Richardson v. Colburn, 412.

CHATTEL MORTGAGE.

Mortgage Given to Third Person in Consideration of Sale of Printing Press Is a Purchase-Money Mortgage—Mortgage Filled in Wisconsin Is Constructive Notice to Minnesota Purchaser of Property.

—Strickland v. Minnesota Type-Foundry Co., 210.

See Pleading, 124.

CHECK.

Passing Check Is Representation that Check Is Good for the Amount, and Will Be Paid upon Presentation—Indictment under G. S. 1894, § 6711.

—State v. Johnson, 267.

CLASSIFICATION.

See Municipal Corporation, 445.

COLD-STORAGE.

See Mortgage, 319.

COLLATERAL ATTACK.

See Assessment, 256.

COMMISSION.

See Pleading, 245.

COMMISSION MERCHANT.

Commission Merchants Selling Farm Produce—License—Laws 1899, c. 225.

—State ex rel. v. Wagener, 483.

COMMON CARRIER.

Inspection of Car Furnished Shipper at Time of Delivery to Connecting Carrier.

—Olson v. Pennsylvania & Ohio Fuel Co., 528.

COMPLAINT.

See Pleading, 124, 210, 245, 291, 438, 509, 528.

CONSIDERATION.

Promissory Note—Action against One Maker—Partial Failure of Consideration by Breach of Warranty to Joint Makers.

—Nichols & Shepard Co. v. Soderquist, 509.

CONSTITUTION.

Exemption of Building Associations from Usury Laws Constitutional.

—Zenith Building & Loan Assn. v. Helmbach, 97.

Assessment for Local Improvement—City of St. Paul.

—State ex rel. v. District Court of Ramsey Co., 248.

Gross-Earnings Tax upon Railway—Land Grant—Sp. Laws 1873, c. 111, and Sp. Laws 1875, c. 54, Unconstitutional so far as Repugnant to Const. art. 4, § 32a—Laws 1895, c. 168, Constitutional.

—State v. Duluth & Iron Range R. Co., 433.

Const. art. 4, §§ 33, 34, 36—General Laws for Cities—Classification by Population—Law for Temporary Purpose—Laws 1899, c. 50, Constitutional.

—Alexander v. City of Duluth, 445.

Laws 1899, c. 40, Unconstitutional Special Legislation—Additional Tax for Schools in Certain Cities.

—State ex rel. v. Johnson, 453.

Commission Merchants Selling Farm Produce—License—Laws 1899, c. 225, Constitutional—Police Power—Class Legislation—Discrimination—Interference with Interstate Commerce—Delegation of Legislative Authority.

—State ex rel. v. Wagener, 483.

See Water, 317.

CONTRACT.

Contract for Public Work—Withholding Payment by Municipal Corporation from Contractor upon Notice from His Surety.

—American Surety Co. v. Board of County Commissioners, 92.

Construction of Contract for Banking Logs—Scale of Surveyor General Conclusive, Except for Fraud.

—Boyle v. Musser-Sauntry Land, Logging & Mnfg. Co., 206.

Contract for Cutting and Booming Logs—Failure to Pay Instalment of Price when Due Will not Warrant Abandonment of Contract nor Recovery of Anticipated Profits—Demurrer.

—Beatty v. Howe Lumber Co., 272.

Contract for Transporting U. S. Mail—Subcontract—Cancellation of Subcontract by Postmaster General.

—Galnes v. Trengrove, 349.

Rescission of Executed Contract of Sale of Real Estate because of Fraud—Waiver by Delay.

—McQueen v. Burhans, 382.

Special Contract for Services—Failure to Perform—Evidence.

—Marquardt v. Hubner, 442.

CONTRACT—Continued.

Oral Contract with School Teacher Void—G. S. 1894, § 3694.

Leland v. School District No. 28, 469.

See Broker, 245; Departure, 462; Insurance (Fidelity), 24; Pleading, 428, 462.

CONTRIBUTORY NEGLIGENCE.

See Negligence; Street Railway, 171.

CONVERSION.

Sale of Stock of Merchandise to Plaintiffs in Fraud of Other Creditors—Verdict Sustained by Evidence.

—Scheffer v. Lowe, 279.

See Pleading, 124, 210.

CORPORATION.

Insolvency of Corporation Limited to Norwegians—Other Stockholders Estopped from Denying Liability.

—Blien v. Rand, 110.

Transfer of Certificate of Membership of Bankrupt in Chamber of Commerce.

—State ex rel. v. Chamber of Commerce, 308.

Insolvent Corporation—Bonds of Corporation Guaranteed by Individual Stockholders—Other Stockholders Liable under G. S. 1894, c. 76, Before Recourse to Personal Guaranty.

—Winthrop National Bank v. Minneapolis T. E. Co., 329.

Laws 1895, c. 295, Applies to Corporation as well as to Personal Surety.

—American Surety Co. v. Nelson, 402.

See Garnishment, 137.

COSTS.

See Judgment, 543.

COUNTY AND COUNTY OFFICERS.

An Organized County Cannot Create, in Behalf of an Unorganized County Attached to It for Judicial Purposes, an Indebtedness Valid against the Unorganized County—County Orders—Demurrer.

—First National Bank v. Board of County Commissioners, 43.

Organization of New County—Mechanic's Lien Statement.

—Meehan v. Zeh, 63.

Refusal of Sheriff to Pay Over Redemption Money—Prior Tender and Refusal to Accept.

—Hull v. Chapel, 159.

Action by Taxpayer to Compel Restitution of County Money—De-

COUNTY AND COUNTY OFFICERS—Continued.

mand upon County Commissioners—Election of New Board before
Action—Judicial Notice—Demurrer.

—Bailey v. Strachan, 526.

COURT (SUPREME).

Change of Venue—Laws 1895, c. 28—Jurisdiction to Issue Writ of
Mandamus.

—State ex rel. v. District Court of Meeker Co., 302.

COURTS (DISTRICT)

See Jurisdiction, 405.

CRIMINAL LAW.

Warehouse Receipt for Grain—Grand Larceny—Indictment Sufficient
Under Penal Code, § 415, subd. 2.

—State v. Barry, 128.

Grand Larceny—Indictment Based upon G. S. 1894, § 6711—Check
Drawn upon Bank Accustomed to Pay Overdrafts—Verdict not
Sustained by Evidence.

—State v. Johnson, 267.

Grand Larceny—Obtaining Money under False Pretenses—False
Writing—"With Intent to Defraud"—Indictment Need not Contain
Precise Words of Statute—Time Checks—Evidence of Other Sim-
ilar False Time Checks.

—State v. Southall, 296.

See Intoxicating Liquor, 540.

CROSS-EXAMINATION.

Under G. S. 1894, § 5659, Cross-Examination of Superintendent of
Mill Where Accident Occurred Permissible.

—Bennett v. E. W. Backus Lumber Co., 198.

Cross-Examination of Wife—Husband Acting as Agent for Wife
after His Insolvency—Action to Enforce Resulting Trust against
Land of Wife.

—National German American Bank v. Lawrence, 282.

Cross-Examination of Plaintiff—Conviction for Drunkenness—G. S.
1894, § 5658.

—Harding v. Great Northern Ry. Co., 417.

DAM.

Removal of Dam by Owner—Injunction Sought by Riparian Owner—
Equities.

—Kray v. Muggli, 231.

DAMAGES.

Personal Injury—Sprained Ankle—Damages Excessive.

—Bennett v. E. W. Backus Lumber Co., 198.

DAMAGES—Continued.

Breach of Contract—Recovery of Anticipated Profits.

—Beatty v. Howe Lumber Co., 272.

Personal Injury—Street Railway—Damages not Excessive.

—Fonda v. St. Paul City Ry. Co., 336.

See Trespass, 421; Warranty, 27.

DATE.

Mechanic's Lien Statement—Incorrect Dates of Furnishing Material.

—Coughlan v. Longini, 514.

DEATH BY WRONGFUL ACT.

See Street Railway, 171.

DEBT.

Creation of Debt in Behalf of Unorganized County.

—First National Bank v. Board of County Commissioners, 43.

DEED.

Subsequent Deed Recorded Prior to Earlier Deed—Action to Quiet Title.

—Palmer v. Yorks, 20.

Grant of Right of Way to Cross Land—Omission of Words of Inheritance—Easement, not Revocable License—Description of Land Definite.

—Lidgerding v. Zignego, 421.

See Trust, 12.

DEFECT OF PARTIES.

Contract—Defect of Parties Plaintiff and Defendant—Departure in Reply from Complaint.

—Hoxsle v. Kempton, 462.

DEMAND.

Action to Compel Restitution of County Money—Demand upon County Commissioners—Election of New Board before Action—Judicial Notice.

—Bailey v. Strachan, 526.

DEMURRER.

See Contract, 272; County and County Officers, 43; Equity, 218; Game and Fish, 518; Insurance (Fire), 474; Pleading, 509; Public Money, 526; Trust, 12.

DEPARTURE.

Complaint, Contract between Two Plaintiffs as Partners and Defendant—Answer, Contract between Plaintiffs and Third Person as Partners and Defendant and Another as Partners—Reply, Contract

DEPARTURE—Continued.

as Alleged in Answer and Assignment of Cause of Action to Plaintiffs and Agreement of Defendant to Pay Debts of His Firm—Reply
Departure from Complaint.
—Hoxsle v. Kempton, 462.

DESCRIPTION.

Description of Property Covered by Chattel Mortgage—Identification of Property.
—Schneider v. Anderson, 124.
Assessment for Local Improvement—Bazille & Roberts Addition to St. Paul.
—Merchants' Realty Co. v. City of St. Paul, 343.
Wrong Description of Land in Proceedings of Sale by Administrator
—Range 5 instead of Range 6—Correction in Order of License 27 Years after Sale.
—Hanson v. Ingwaldson, 533.
See Insurance (Fire), 31.

DISMISSAL.

Dismissal of Case upon Trial—Judgment of Dismissal upon the Merits Erroneous—G. S. 1894, § 5408, Third.
—McCune v. Eaton, 404.

DIVORCE.

Modification of Decree for Payment of Alimony—G. S. 1894, § 4814.
—Smith v. Smith, 67.

DULUTH (CITY OF).

See Municipal Corporation, 445.

EASEMENT.

Right of Way to Cross Land on Foot or with Team—Omission from Deed of Words of Inheritance—Right Appurtenant to Land of Grantee, not an Easement in Gross.
—Lidgerding v. Zignego, 421.
See Riparian Right, 231.

EJECTMENT.

Pleading—What Equities Provable, and What not Provable, under General Denial.
—Travelers' Insurance Co. v. Walker, 438.

ELECTION.

Failure of Widow to Elect, under G. S. 1894, § 4472, to Renounce Provisions of Husband's Will.
—New Hampshire Savings Bank v. Barrows, 138.

ELECTION—Continued.

Election of School Trustees by Acclamation Invalid—G. S. 1894, § 3677.

—School District No. 47 v. Weise, 167.

Election between Inconsistent Remedies not Applicable—Fire Insurance Policy—Refusal to Arbitrate as to Amount of Loss.

—Schrepfer v. Rockford Insurance Co., 291.

EMINENT DOMAIN.

Condemnation by City of St. Paul of Its Own Land for Alley.

—State ex rel. v. District Court of Ramsey Co., 248.

Parties to Action by Mortgagees to Obtain Lien upon Award.

—Lumbermen's Insurance Co. v. City of St. Paul, 410.

EQUITY.

An Executor Can Maintain Suit in Equity against His Co-Executor, if There Be no Remedy at Law.

—Peterson v. Vanderburgh, 218.

Ejectment—What Equities Provable, and What not Provable, under General Denial.

—Travelers' Insurance Co. v. Walker, 438.

See Estoppel, 231; Redemption, 54.

ESTATE OF DECEDENT.

Executors of Surety upon Bond of Assignee in Insolvency Liable to Creditors of Insolvent, after Conversion by Assignee, Though Time for Filing Claims against Estate of Testator Has Expired.

—Berryhill v. Peabody, 59.

Suit in Equity against Co-Executor to Ascertain Amount of His Debt to Estate.

—Peterson v. Vanderburgh, 218.

ESTOPPEL.

Trustee under Administrator's Deed Estopped from Denying Title of Cestui que Trust.

—Sterling v. Sterling, 12.

Insolvent Corporation—Stockholders Limited to Specified Nationality

—Other Stockholders Estopped from Denying Liability.

—Blien v. Rand, 110.

Loan by One Bank to Officer of Another by Crediting Account of Second Bank—No Estoppel against First Bank Setting up Fraud of Borrowing Officer.

—Selover v. First National Bank, 140.

Equitable Estoppel—Injunction against Removal of Dam—Equities of Riparian Owners.

—Kray v. Muggli, 231.

ESTOPPEL—Continued.

Insurance against Fire—Owner of Flour Mill, after Insurance, Estopped from Questioning Validity of Insurance.

—Langworthy v. C. C. Washburn Flouring Mills Co., 256.

EVIDENCE.

Admission of Shortage of Agent Competent Evidence against Insurer of His Fidelity.

—Hall v. U. S. Fidelity & Guaranty Co., 24.

Enforcing Lien of Judgment against Husband upon Land of Wife—

Evidence of Husband as to Payment for Improvements Put upon Land.

—Christian v. Klein, 116.

Evidence of Insolvency of Bank Conclusive—Admission of Evidence.

—Selover v. First National Bank, 140.

Evidence of Clean Drive of Logs.

—Boyle v. Musser, 153.

Judgment not Evidence of Antecedent Debt.

—Hoerr v. Melhofer, 228.

Obtaining Money by False Pretenses—Time Checks—Evidence of Other Similar False Time Checks to Prove Fraudulent Intent.

—State v. Southall, 206.

Personal Injury—Difference in Evidence Given upon First and Second Trials—Employment of Motorman after Accident.

—Fonda v. St. Paul City Ry. Co., 336.

Street Railway—Admission of Conversation between Conductor and Another Passenger Error—Res Gestæ—Admission Made by Claim Agent.

—Reem v. St. Paul City Ry. Co., 503.

See Books of Account, 31; Fire, 360; Inspector of Steam Boilers, 355; Justice of the Peace, 510; Log, 206; Supplementary Proceedings, 282; Witness, 27.

EXCEPTION.

Amendment of Record by Stipulation—Omission of Exception—Waiver of Original Exception.

—Selser Bros. Co. v. Minneapolis Cold-Storage Co., 186.

EXECUTION.

Issue of Execution before Filing of Transcript of Judgment—Recital of Filing Transcript Two Days after Date of Execution.

—Hoerr v. Melhofer, 228.

EXECUTOR AND ADMINISTRATOR.

One Executor Can Maintain Suit in Equity against His Co-Executor to Ascertain Amount of Debt to Estate, etc., if There Be no Remedy at Law.

—Peterson v. Vanderburgh, 218.

EXECUTOR AND ADMINISTRATOR—Continued.

Administrator's Sale Void—Wrong Description in Probate Proceedings—Range 5 instead of Range 6—Correction of Order of License 27 Years after Sale.

—Hanson v. Ingwaldson, 533.

See Trust, 12.

FACTOR.

Sale of Farm Produce—License—Laws 1899, c. 225.

—State ex rel. v. Wagener, 483.

See Negligence, 186.

FILING.

Chattel Mortgage Filed in Wisconsin Is Constructive Notice to Minnesota Purchaser of Mortgaged Property.

—Strickland v. Minnesota Type-Foundry Co., 210.

See Judgment, 228.

FINDING OF COURT.

Omission to Find Fact of No Redemption from Tax Sale not Fatal to Conclusion of Law.

—Gehr v. Knight, 88.

FIRE.

Right of Way of Fire Apparatus Going to Fire—Firemen Taking Risks—Collision with Street Car.

—Warren v. Mendenhall, 145.

Fire Started by Defendant—Verdict for Plaintiff not Sustained by Evidence.

—Brennan Lumber Co. v. Great Northern Ry. Co., 360.

FORECLOSURE.

Appointment of Receiver of Rents and Profits after Foreclosure Sale.

—National Fire Insurance Co. v. Broadbent, 175.

FRAUD.

Conveyance in Fraud of Creditors—Evidence of Judgment not Evidence of Antecedent Debt—Successor of Judgment Creditor Cannot Question Conveyance.

—Hoerr v. Melhofer, 228.

Sale of Stock of Merchandise to One Creditor in Fraud of Other Creditors.

—Scheffer v. Lowe, 279.

Time Checks—Obtaining Money by False Pretenses—False Representation Need not Be Oral—Charge to Jury.

—State v. Southall, 296.

FRAUD—Continued.

Rescission of Sale of Real Estate because of Fraud—Laches.
 —McQueen v. Burhans, 382.
 See Estoppel, 140.

GAME AND FISH.

White Earth Reservation—Tribal Indians Licensed to Hunt and Fish
 —Replevin—Demurrer.
 —State v. Cooney, 518.

GARNISHMENT.

Garnishment of Assignee of Corporation in Insolvency—Armour
 Packing Co. v. Brown Followed.
 —Devlin v. James McMillan & Co., 137.
 Garnishment of Assignee for Benefit of All Creditors—Assignee not
 a Resident Freeholder.
 —Lanpher v. Burns, 407.
 Justice of the Peace—No Judgment against Garnishee for Less than
 Ten Dollars—G. S. 1894, § 5338.
 —Sheehan v. Newpick, 426.

GENERAL DENIAL.

Ejectment—What Equities Provable, and What Equities not Prov-
 able, under General Denial.
 —Travelers' Insurance Co. v. Walker, 438.

GIFT.

Gift by Husband to Wife of Certificates of Stock—Fact of Delivery—
 Charge to Jury.
 —Richardson v. Colburn, 412.

GRAIN.

Warehouse Receipt for Grain—Contract of Bailment not of Sale—
 Grand Larceny.
 —State v. Barry, 128.
 Laws 1895, c. 148, Requiring License, Applicable to Operator of
 Private Warehouse for Storing Its Own Grain.
 —State ex. rel. v. W. W. Cargill Co., 223.
 Commission Merchants Selling Farm Produce—License—Laws 1890,
 c. 225.
 —State ex rel. v. Wagener, 483.

GUARDIAN AND WARD.

Sale of Homestead by Mother as Guardian to Her Second Husband
 Voidable at Election of Wards—G. S. 1894, § 4605—Fraud in Ap-
 praisal.
 —Brown v. Fischer, 1.

GUARDIAN AND WARD—Continued.

Failure of Ward for 15 Years after Attaining His Majority to Cite
Guardian into Court to Settle His Account with Ward a Bar.

—Hanson v. Swenson, 70.

HABEAS CORPUS.

Laws 1890, c. 225—Commission Merchants Selling Farm Produce—
License.

—State ex rel. v. Wagener, 483.

HIGHWAY.

Statutory User of Highway—Finding Sustained by Evidence.

—Rogers v. Town of Aitkin, 539.

HOMESTEAD.

Sale by Guardian to Her Husband.

—Brown v. Fischer, 1.

HUSBAND AND WIFE.

Wife who, as Guardian, Sells Ward's Real Estate to Her Husband
Is Interested in Purchase—Sale Voidable under G. S. 1894, § 4605.

—Brown v. Fischer, 1.

Conveyance to Wife—Action to Enforce Lien of Judgment against
Husband—Evidence of Judgment Debtor.

—Christian v. Klein, 116.

Judgment against Deceased Husband not a Lien upon Widow's Third
of His Real Estate—G. S. 1894, § 4472.

—New Hampshire Savings Bank v. Barrows, 138.

G. S. 1894, § 5662—Examination of One Spouse without Consent of
the Other—Husband a Proper Party to Action—Leonard v. Green
Distinguished—Cross-Examination of Spouse.

—National German American Bank v. Lawrence, 282.

See Gift, 412.

INDIAN.

White Earth Reservation—Tribal Indians Licensed to Hunt and Fish
Therein.

—State v. Cooney, 518.

INDICTMENT.

See Criminal Law, 296.

INJUNCTION.

Trial of Title to Office by Injunction—Trustees of School District—
Possession of Officers de Jure and de Facto.

—School District No. 47 v. Weise, 167.

Injunction against Removal of Dam.

—Kray v. Muggli, 231.

INJUNCTION—Continued.

Removal of Cold-Storage Plant from Mortgaged Premises.

—Northwestern Mutual Life Insurance Co. v. George, 319.

Injunction against Issue of Bonds.

—Alexander v. City of Duluth, 445.

INSOLVENCY.

Sureties upon Bond of Assignee Liable even when Creditors Fail to Have Assignee Removed for Conversion of Funds—Laches.

—Berryhill v. Peabody, 59.

Evidence of Insolvency of Bank at Given Time Conclusive—Admission, if Erroneous, without Prejudice.

—Selover v. First National Bank of Minneapolis, 140.

Transfer of Certificate of Membership of Adjudged Bankrupt.

—State ex rel. v. Chamber of Commerce, 308.

Assignment for Benefit of Creditors—If not Apparent that It Is under Laws 1881, c. 148, Instrument Is Common-Law Assignment under Act of 1876—Assignee under Act of 1876 Must Be Resident Freeholder—Garnishment of Assignee.

—Lanpher v. Burns, 407.

Insolvency of Principal upon Appeal Bond—Probable Defeat of Levy by Assignment for Benefit of Creditors Too Speculative.

—Vent v. Duluth Trust Co., 523.

See Assignment for Benefit of Creditors, 402; Corporation, 110, 329; Garnishment, 137.

INSPECTOR OF STEAM BOILERS.

Eligibility of Inspector under G. S. 1894, § 481—Quo Warranto—Appointment Sustained if Evidence Reasonably Tends to Support His Eligibility.

—State ex rel. v. Gylstrom, 355.

INSTALMENT.

Contract—Failure to Pay Instalment of Price when Due.

—Beatty v. Howe Lumber Co., 272.

INSURANCE (FIDELITY).

Employment of Potato Buyer after Application to Insurer and Issue of Contract "Subject to Result of Investigation" of Buyer—Admissions of Shortage by Buyer Competent Evidence.

—Hall v. U. S. Fidelity & Guaranty Co., 24.

INSURANCE (FIRE).

Policy Covering Lumber upon Railroad Right of Way—Description in Policy not Limited by Description, or Plat, in Application which Is not Attached to Policy—Same with Warranty—Laws 1895, c.

INSURANCE (FIRE)—Continued.

175, § 52—Offer of Books of Account to Prove Value of Lumber Destroyed—G. S. 1894, § 5738—Secondary Evidence.

—Coleman v. Retail Lumbermen's Insurance Assn., 31.

Mutual Company Organized under Illinois Statute—Authority to Insure Dwellings "and Other Property"—Owner of Flour Mill, after Benefit of Insurance, Estopped from Denying Validity—Premium Note—Assessment to Pay Expenses of Receivership—Certificates of Indebtedness for Advance Premiums not a Liability of Company.

—Langworthy v. C. C. Washburn Flouring Mills Co., 256.

Arbitration as to Amount of Loss—Refusal to Arbitrate Equivalent to Waiver of Right to Appraisal, but not of Right to Recover—Payment of Loss—Interest.

—Schrepfer v. Rockford Insurance Co., 291.

Failure of Broker to Write Policy—Variance between Cause of Action Alleged and Finding of Court.

—Joannin-Hansen Co. v. W. A. Barnes & Co., 428.

Total Loss—Insurable Value—Vacancy of Premises without Consent of Insurer—Increase of Risk—Minnesota Standard Policy—Laws 1895, c. 175.

—Doten v. Aetna Insurance Co., 474.

INSURANCE (LIFE).

Verdict not Sustained by Evidence—Body Found Unlike That of Insured.

—Baxter v. Covenant Mutual Life Assn., 80.

INTEREST.

Policy of Fire Insurance—Interest upon Loss from What Time.

—Schrepfer v. Rockford Insurance Co., 291.

INTOXICATING LIQUOR.

Excessive Use of Intoxicating Liquor—Cross-Examination of Plaintiff—Conviction for Drunkenness—G. S. 1894, § 5658.

—Harding v. Great Northern Ry. Co., 417.

Sale in Minneapolis—Charter and Ordinance of City not Repealed by Laws 1887, c. 6.

—State v. Lindquist, 540.

JUDGMENT.

Transcript of Judgment Used before Record of Judgment—Clark v. Butts Followed.

—Schelbel v. Anderson, 54.

Modification of Decree for Payment of Alimony.

—Smith v. Smith, 67.

Action to Enforce upon Land of Wife Lien of Judgment against Husband.

—Christian v. Klein, 116.

JUDGMENT—Continued.

Judgment against Deceased Husband not a Lien upon Widow's Third of His Real Estate.

—New Hampshire Savings Bank v. Barrows, 138.

Opening Judgment by Default—Action upon Bond—Sureties Relying upon Principal Defending Them.

—Hull v. Chapel, 159.

Issue of Execution Prior to Docketing Judgment—Evidence of Judgment not Evidence of Antecedent Debt.

—Hoerr v. Melhofer, 228.

Action to Determine Boundaries—Laws 1893, c. 68—Mandatory that Judgment Locate Boundary Lines.

—Benz v. City of St. Paul, 375.

Dismissal of Case at Close of Plaintiff's Testimony—Judgment of Dismissal—Refusal to Strike out "upon the Merits," Error—G. S. 1894, § 5408, Third.

—McCune v. Eaton, 404.

Justice of the Peace—No Judgment against Garnishee for Less than Ten Dollars—G. S. 1894, § 5338.

—Sheehan v. Newpick, 426.

Summons Served upon Wrong Person of Similar Name—Failure to Appear or Answer—Judgment Vacated upon Terms—G. S. 1894, § 5267.

—Ueland v. Johnson, 543.

See Judgment notwithstanding Verdict, 442.

JUDGMENT NOTWITHSTANDING VERDICT.

Judgment notwithstanding Verdict where, as Matter of Law, Moving Party Is Entitled to Verdict—Laws 1895, c. 320—Cruikshank v. St. Paul F. & M. Ins. Co. Followed.

—Marquardt v. Hubner, 442.

See Railway, 465.

JUDICIAL NOTICE.

See County and County Officers, 528.

JURISDICTION.

Jurisdiction of Probate Court—Suit in Equity in District Court by One Executor to Ascertain Amount Due to Estate from Co-Executor.

—Peterson v. Vanderburgh, 218.

Jurisdiction of District Court—Appeal from Justice of the Peace—Crime of Assault—Writ of Prohibition.

—State ex rel. v. District Court of Watonwan Co., 405.

JURY.

Challenge to Juror for Cause—Decision not Reviewable upon Appeal.

—Bennett v. E. W. Backus Lumber Co., 198.

JUSTICE OF THE PEACE.

Appeal to District Court—Writ of Prohibition.

—State ex rel. v. District Court of Watonwan Co., 405.

No Judgment against Garnishee for Less than Ten Dollars—G. S. 1894, § 5338.

—Sheehan v. Newpick, 426.

Certificate on Appeal to District Court Defective—Transcript of Evidence.

—Kloss v. Sanford, 510.

LACHES.

Guardian and Ward—Failure of Ward for 15 Years after Majority to Compel Settlement of Account.

—Hanson v. Swenson, 70.

Rescission of Sale of Real Estate because of Fraud—Laches.

—McQueen v. Burhans, 382.

See Principal and Surety, 59.

LAND GRANT.

See Taxes, 433.

LARCENY.

See Criminal Law, 128, 267, 296.

LICENSE.

Laws 1895, c. 148, Requires Operator of Private Warehouse for Storing Grain to Be Licensed.

—State ex rel. v. W. W. Cargill Co., 223.

Right of Way to Cross Land—Omission of Words of Inheritance from Deed—Easement, not a Revocable License.

—Lidgerding v. Zignego, 421.

Laws 1899, c. 225—Commission Merchants Selling Farm Produce—License.

—State ex rel. v. Wagener, 483.

LIEN.

See Judgment, 138.

LOG.

Compensation under G. S. 1894, § 2466, for Driving Intermingled Logs to Place where Boom Company Had Exclusive Possession of River —Partner in Firm Owning Recorded Log Mark Liable for Logs Marked with His Consent—Evidence of Clean Drive—Good Faith.

—Boyle v. Musser, 153.

Contract for Banking Logs—Scale of Surveyor General Conclusive, Except for Fraud—Exclusion of Evidence to Impeach Scale.

—Boyle v. Musser-Sauntry Land, Logging & Mnf. Co., 206.

See Contract, 272.

MANDAMUS.

Action to Determine Boundaries—Amendment of Complaint—Mandamus to Compel Court to Amend Findings.

—Benz v. City of St. Paul, 375.

See Chamber of Commerce, 308; Change of Venue, 302; School, 453.

MASTER AND SERVANT.

See Personal Injury, 198.

MECHANIC'S LIEN.

Real Estate in Red Lake County—Statement for Lien Filed in Polk County after Organization of Former County Invalid.

—Meehan v. Zeh, 63.

Lien Statement—Incorrect Dates of Furnishing Material Given—Word "Material" Supplied from Context—Recutting of Glass Extended Time—Extras.

—Coughlan v. Longini, 514.

MINNEAPOLIS (CITY OF).

See Intoxicating Liquor, 540; Municipal Corporation, 76.

MORTGAGE.

Authority of Loan Agent to Receive Payment of Mortgage before Maturity without Knowledge of Principal or Possession of Securities.

—Schenk v. Dexter, 15.

Without Knowledge of Principal, Mortgage of Third Person Taken upon Agent's Land—Money Used by Agent—Prior Mortgage Paid by Agent, but Unsatisfied of Record—Principal's Executrix Subrogated to Rights of Prior Mortgagee—Payment with Identical Money Immaterial.

—Webber v. Hausler, 48.

Mortgage to Building Association not Usurious.

—Zenith Building & Loan Assn. v. Helmbach, 97.

Removal from Mortgaged Premises of Cold-Storage Apparatus—New Apparatus, Title Remaining in Seller, not Subject to Lien of Mortgage—Injunction.

—Northwestern Mutual Life Insurance Co. v. George, 319.

Award in Condemnation Proceedings—Parties to Action by Mortgagees to Obtain Lien upon Award.

—Lumbermen's Insurance Co. v. City of St. Paul, 410.

See Receiver, 175.

MUNICIPAL CORPORATION.

Personal Injury to Wife of Plaintiff—Tarras v. City of Winona, 71 Minn. 22, Followed—City not Negligent in Failing to Erect Railing along Highway.

—Tarras v. City of Winona, 57.

MUNICIPAL CORPORATION—Continued.

Notice of Personal Injury under Laws 1897, c. 248—Service upon Assistant Clerk of City of Minneapolis—Charter of Minneapolis—Copy of Notice.

—Kelly v. City of Minneapolis, 76.

Contract for Public Work—Bond under Laws 1895, c. 354, § 1—No Authority to Withhold Money Earned from Delinquent Contractor upon Notice from His Surety.

—American Surety Co. v. Board of County Commissioners, 92.

Land Owned by City of St. Paul—Eminent Domain—Payment of Assessment against Certain Lots—Reassessment against Same Lots because of Nonpayment by Others—Proportionate Share of Benefit—Constitution.

—State ex rel. v. District Court of Ramsey Co., 248.

City of St. Paul—Sale for Unpaid Local Assessment—Defective Notice of Time for Redemption—Issue of Void Tax Deed—Purchaser of Tax Certificate Cannot Recover Amount Paid to City because Deed Was Void.

—Merchants' Realty Co. v. City of St. Paul, 343.

City of St. Paul—Sale for Nonpayment of Local Assessment—Testing Validity of Sale—Statute of Limitations—Sp. Laws 1889, c. 32, § 50, Governs.

—London & Northwest American Mortgage Co. v. Gibson, 394.

Injunction against Issue of Bonds—Bonds for Floating Debt—Laws 1899, c. 50, Constitutional—General Laws for Cities—Classification of Cities by Population—For a Temporary Purpose—Const. art. 4, §§ 33, 34, 36.

—Alexander v. City of Duluth, 445.

Additional Tax for Schools in Cities of 50,000 Inhabitants—Laws 1899, c. 40, Unconstitutional.

—State ex rel. v. Johnson, 453.

See Fire, 145.

NEGLIGENCE.

Personal Injury at Railway Crossing—Verdict Sustained by Evidence of Negligence—Where Concurring Negligence of Both Parties Causes Injury Each Party Is Liable for the Result.

—King v. Chicago, Milwaukee & St. Paul Ry. Co., 104.

Street Railway—Negligence in Starting Car and Contributory Negligence Questions for Jury.

—Currie v. Mendenhall, 179.

Consignment of Lemons and Onions to Factor—Finding of Negligence Sustained by Evidence.

—Selser Bros. Co. v. Minneapolis Cold-Storage Co., 196.

Street Railway—Permitting Overcrowding of Car Platform.

—Reem v. St. Paul City Ry. Co., 503.

NEGLIGENCE—Continued.

See Fire, 145; Municipal Corporation, 57; Personal Injury, 198; Street Railway, 145, 171.

NEW TRIAL.

Personal Injury—Improbable Evidence—Abuse of Discretion to Refuse New Trial.

—Messenger v. St. Paul City Ry. Co., 34.

Life Insurance—Identity of Body with That of Insured—Error not to Grant New Trial.

—Baxter v. Covenant Mutual Life Assn., 80.

Order Granting New Trial not Reversed—Hicks v. Stone Followed.

—Swenson v. Erlandson, 189.

Moving Affidavit—Failure to Find Witness Insufficient.

—Wellendorf v. Tesch, 512.

NOTICE.

Notice of Redemption from Tax Sale Sufficient.

—Knight v. Knoblauch, 8.

Service of Notice of Personal Injury upon Assistant Clerk of City of Minneapolis.

—Kelly v. City of Minneapolis, 76.

City of St. Paul—Sale under Judgment for Local Assessment Advertised with Other Sales—Sp. Laws 1889, c. 32, subc. 7, tit. 1, § 30.

—London & Northwest American Mortgage Co. v. Gibson, 394.

See Chattel Mortgage, 210.

OFFICE.

Trial of Title to Office by Injunction—Possession of Officers de Jure and de Facto.

—School District No. 47 v. Weise, 167.

See Inspector of Steam BOLLERS, 355.

PARTIES TO ACTION.

Action by Judgment Creditor of Husband to Enforce Resulting Trust against Land of Wife—Husband a Proper Party.

—National German American Bank v. Lawrence, 282.

Condemnation Proceedings—Heirs and Next of Kin of Deceased Mortgagor Proper Parties to Action by Mortgagees to Obtain Lien upon Damages Awarded upon Mortgaged Premises.

—Lumbermen's Insurance Co. v. City of St. Paul, 410.

PARTITION.

Actual Partition and Sale Where Life Estate Extends to Part of Land Only.

—Hanson v. Ingwaldson, 533.

PARTNERSHIP.

See Street Railway, 34.

PAYMENT.

Withholding Payment from Delinquent Contractor upon Notice from His Surety.

—American Surety Co. v. Board of County Commissioners, 92.

Chattel Mortgage—Allegation of Nonpayment Unnecessary in Complaint in Action by Mortgagee for Conversion.

—Strickland v. Minnesota Type-Foundry Co., 210.

Contract—Failure to Pay Instalment of Price when Due.

—Beatty v. Howe Lumber Co., 272.

Payment of Loss under Policy of Insurance—Interest.

—Schrepfer v. Rockford Insurance Co., 291.

Nonpayment of Premium to Surety Company—Removal of Assignee for Benefit of Creditors—Acceptance of Part Payment of Premium not a Waiver of Right to Removal.

—American Surety Co. v. Nelson, 402.

See Mortgage, 15, 48.

PERSONAL INJURY.

Unsupported Evidence of Plaintiff Too Improbable to Support Verdict.

—Messenger v. St. Paul City Ry. Co., 34.

Collision between Fire Apparatus Going to Fire and Street Car.

—Warren v. Mendenhall, 145.

Saw Mill—Movable Table Operated on Rollers—Removal of Log by Servant—Verdict Sustained by Evidence.

—Bennett v. E. W. Backus Lumber Co., 198.

See Municipal Corporation, 57; Railway, 104, 417, 465, 528; Street Railway, 179, 336, 503.

PLEADING.

Possession of Plaintiff Immaterial in Action to Determine Particular Specified Claim when Answer Is in Effect a Cross Action.

—Palmer v. Yorks, 20.

Chattel Mortgage—Levy by Sheriff under Execution against Mortgagor—Complaint Served before Amendment of G. S. 1894, § 4129, by Laws 1897, c. 292, Contained Sufficient Allegations of Cause of Action—Good Faith.

—Schneider v. Anderson, 124.

Allegation of Nonpayment of Chattel Mortgage Unnecessary in Complaint in Action by Mortgagee for Conversion of Mortgaged Property.

—Strickland v. Minnesota Type-Foundry Co., 210.

Action for Broker's Commission for Obtaining Purchaser of Real Estate—Complaint States a Cause of Action.

—Harriott v. Holmes, 245.

PLEADING—Continued.

Action upon Policy of Insurance against Fire—Unnecessary for Complaint to Negative Loss from Excepted Risks.

—Schrepfer v. Rockford Insurance Co., 291.

Allegation of Application to Broker for Additional Insurance against Fire and Failure to Write Policy—Finding of Agreement to Write Policy and Neglect Either to Write or Notify Plaintiff of Failure to Write Policy—Judgment Reversed.

—Joannin-Hansen Co. v. W. A. Barnes & Co., 428.

Complaint in Ejectment—Source of Title and Right to Possession not Pleaded—Under General Denial Defendant Can Prove Equity Which Will Defeat Plaintiff's Right to Possession, but Cannot Prove Equity Which Will not, Without Affirmative Relief, Defeat Plaintiff's Possession.

—Travelers' Insurance Co. v. Walker, 438.

Contract—Defect of Parties Plaintiff and Defendant—Departure in Reply from Complaint.

—Hoxsie v. Kempton, 462.

Policy of Fire Insurance—Vacancy of Premises without Consent of Insurer the Defense—Increase of Risk—Minnesota Standard Policy—Demurrer to Answer Overruled.

—Doten v. Ætna Insurance Co., 474.

Promissory Note—Action against One Maker—Partial Failure of Consideration by Breach of Warranty to Joint Makers—Demurrer.

—Nichols & Shepard Co. v. Soderquist, 509.

Personal Injury—Railway Delivering Car to Connecting Carrier—Complaint Failing to Allege Car Was Unsafe at Time of Delivery Bad upon Demurrer.

—Olson v. Pennsylvania & Ohio Fuel Co., 528.

POSSESSION.

Ejectment—General Denial—Equities Which Will Defeat Plaintiff's Possession.

—Travelers' Insurance Co. v. Walker, 438.

Action to Determine Adverse Claims—Plaintiff May Succeed as to Part of Land to Which He Proves to Be in Possession.

—Wellendorf v. Tesch, 512.

See Pleading, 20.

PRACTICE.

Amendment of Record by Stipulation—Failure to Insert Exception—Waiver of Original Exception.

Selser Bros. Co. v. Minneapolis Cold-Storage Co., 186.

Removal of Assignee—Order of Removal—Order to Furnish New Bond.

—American Surety Co. v. Nelson, 402.

PRACTICE—Continued.

Judgment of Dismissal upon the Merits—G. S. 1894, § 5408, Third.

—McCune v. Eaton, 404.

See Appeal, 53; Change of Venue, 302.

PRESCRIPTION.

See Riparian Right, 231.

PRINCIPAL AND AGENT.

Authority of Loan Agent to Receive Payment of Mortgage before Maturity without Knowledge of Principal or Possession of Securities—Course of Dealing between Agent and Principal's Husband.

—Schenk v. Dexter, 15.

Cross-Examination of Husband without Consent of Wife—Husband Acting as Agent of Wife after His Insolvency—Action by Creditor of Husband to Enforce Resulting Trust against Land of Wife.

—National German American Bank v. Lawrence, 282.

See Mortgage, 48.

PRINCIPAL AND SURETY.

Liability of Executors of Surety upon Bond of Assignee in Insolvency—Laches.

—Berryhill v. Peabody, 59.

Notice by Surety to Municipal Corporation not to Pay Principal in Default—Bond under Laws 1895, c. 354, § 1.

—American Surety Co. v. Board of County Commissioners, 92.

Tender of Redemption Money by Sheriff—Sureties on Sheriff's Bond Released by Refusal of Plaintiff's Agent to Accept—Subsequent Failure to Pay.

—Hull v. Chapel, 159.

Bonds of Corporation Guaranteed by Individual Stockholders—Other Stockholders Liable under G. S. 1894, c. 76, upon Insolvency of Corporation—Order to Show Cause Obtained by One Bondholder Discharged.

—Winthrop National Bank v. Minneapolis T. E. Co., 329.

Removal of Assignee because of Nonpayment to Surety Company of Premium upon His Bond—Laws 1895, c. 295, Applies to Corporation as Well as to Personal Surety.

—American Surety Co. v. Nelson, 402.

PROHIBITION.

Jurisdiction of District Court—Appeal from Justice of the Peace—Crime of Assault—Writ of Prohibition.

—State ex rel. v. District Court of Watonwan Co., 405.

PROMISSORY NOTE.

Note for Insurance Premium—Insured Estopped, after Insurance, from Questioning Validity—Rochester Ins. Co. v. Martin Dis-

PROMISSORY NOTE—Continued.

- tinguished—Fraudulent Representations—G. S. 1894, § 3173.
- Langworthy v. C. C. Washburn Flouring Mills Co., 256.
- Action against One Maker—Partial Failure of Consideration by Breach of Warranty to Joint Makers Good Defense—Demurrer.
- Nichols & Shepard Co. v. Soderquist, 509.

PUBLIC MONEY.

- Action to Compel Restitution—Demand upon County Commissioners—Demurrer.
- Bailey v. Strachan, 526.

QUO WARRANTO.

- See Inspector of Steam Boilers, 355.

RAILROAD AND WAREHOUSE COMMISSION.

- Laws 1899, c. 225—License for Commission Merchants Selling Farm Produce.
- State ex rel. v. Wagener, 483.
- See Warehouse, 223.

RAILWAY.

- Personal Injury at Highway Crossing.
- King v. Chicago, Milwaukee & St. Paul Ry. Co., 104.
- Personal Injury—Excessive Use of Intoxicating Liquor—Cross-Examination of Plaintiff—Conviction for Drunkenness—G. S. 1894, § 5658.
- Harding v. Great Northern Ry. Co., 417.
- Tax upon Land Grant—Exemption for Five Years—Gross-Earnings Tax—Acceptance by Road of Sp. Laws 1873, c. 111, not a Contract with State.
- State v. Duluth & Iron Range R. Co., 433.
- Personal Injury—Pedestrian Walking off Station Platform—Judgment notwithstanding Verdict.
- Emery v. Chicago, Milwaukee & St. Paul Ry. Co., 465.
- Personal Injury—Inspection of Car Furnished Shipper at Time of Delivery to Connecting Carrier.
- Olson v. Pennsylvania & Ohio Fuel Co., 528.
- See Fire, 360.

RECEIVER.

- Foreclosure of Mortgage—Appointing Receiver of Rents and Profits after Sale—Petition Insufficient.
- National Fire Insurance Co. v. Broadbent, 175.
- Assessment in Mutual Insurance Company for Expenses of Receivership.
- Langworthy v. C. C. Washburn Flouring Mills Co., 256.

RECORD.

Action to Quiet Title by Record Owner against Grantee under Prior Unrecorded Deed.

—Palmer v. Yorks, 20.

See Log, 153.

REDEMPTION.

Form of Notice of Redemption from Tax Sale Sufficient.

—Knight v. Knoblauch, 8.

An Equitable Mortgagee, though in Form the Absolute Owner, May Redeem from a Foreclosure Sale as a Creditor Having a Lien Before Judgment that He Is a Mortgagee.

—Scheibel v. Anderson, 54.

Action to Determine Adverse Claims—Findings Included Notice of Redemption from Tax Sale, but Omitted Fact of No Redemption—Conclusion that Defendant Was Owner not Contradicted by Findings of Fact.

—Gehr v. Knight, 88.

Tender of Redemption Money by Sheriff—Release of Sureties by Refusal of Tender—Subsequent Failure to Pay Amount Due.

—Hull v. Chapel, 159.

City of St. Paul—Defective Notice of Time for Redemption from Sale for Local Assessment—New Notice May Be Given.

—Merchants' Realty Co. v. City of St. Paul, 343.

REPLEVIN.

See Game and Fish, 518.

REPLY.

See Pleading, 462.

RESCISSION.

See Vendor and Purchaser, 382.

RES GESTÆ.

Personal Injury—Conversation between Conductor and Another Passenger.

—Reem v. St. Paul City Ry. Co., 503.

RIPARIAN RIGHT.

Riparian Owner of Wild Land Does not Gain by Prescription Right to Have Perishable Dam across Small River Maintained.

—Kray v. Muggli, 231.

ST. PAUL (CITY OF).

Notice of Redemption from Sale for Unpaid Local Assessment—

ST. PAUL (CITY OF)—Continued.

- Vold Deed—Recovery of Amount Paid by Purchaser of Certificate.
- Merchants' Realty Co. v. City of St. Paul, 343.
- See Municipal Corporation, 248.

SALE.

- Sale of Real Estate by Mother as Guardian of Her Child to Her Husband Voidable at Election of Ward, under G. S. 1894, § 4605.
- Brown v. Fischer, 1.
- Conditional Sale of Cold-Storage Apparatus.
- Northwestern Mutual Life Insurance Co. v. George, 319.
- City of St. Paul—Local Assessment—Notice of Sale Published with Other Notices—Sale for Less than Judgment, Interest, and Costs—Security Trust Co. v. Von Heyderstaedt Distinguished—De Minimis non Curat Lex.
- London & Northwest American Mortgage Co. v. Gibson, 394.
- Administrator's Sale Vold—Wrong Description of Land in Probate Proceedings.
- Hanson v. Ingwaldson, 533.
- See Taxes, 472.

SCHOOL.

- Trustees of School District—Title to Office—Injunction.
- School District No. 47 v. Weise, 167.
- Laws 1899, c. 40, Unconstitutional Special Legislation—Additional Tax for Schools in Cities of 50,000 Inhabitants—Mandamus to County Auditor.
- State ex rel. v. Johnson, 453.
- Oral Contract with Teacher Vold—G. S. 1894, § 3694.
- Leland v. School District No. 28, 460.

SHERIFF.

- Refusal to Pay over Redemption Money—Liability of Sureties of Sheriff.
- Hull v. Chapel, 159.

SPECIAL LEGISLATION.

- Classification of Cities by Population—Const. art. 4, § 36—Law for Temporary Purpose.
- Alexander v. City of Duluth, 445.
- Laws 1899, c. 40, Unconstitutional—Additional Tax for Schools in Certain Cities.
- State ex rel. v. Johnson, 453.

STATUTE.

- G. S. 1894, § 7650, not Repealed by Penal Code, § 415, nor Section 415 by Laws 1895, c. 148.
- State v. Barry, 128.

STATUTE—Continued.

Compliance of Foreign Insurance Company with Statute Authorizing Business in Minnesota—Burden of Proof—False Representations under G. S. 1894, § 3173.

—Langworthy v. C. C. Washburn Flouring Mills Co., 256.

Laws 1895, c. 28—Change of Venue.

—State ex rel. v. District Court of Meeker Co., 302.

G. S. 1894, § 481—Eligibility of Inspector of Steam Boilers.

—State ex rel. v. Gylstrom, 355.

Laws 1893, c. 68—Action to Determine Boundary Lines—Judgment—Constitution—Title of Act.

—Benz v. City of St. Paul, 375.

Laws 1895, c. 320—Judgment notwithstanding Verdict.

—Marquardt v. Hubner, 442.

Laws 1899, c. 50, Constitutional—Bonds to Take up Floating Indebtedness of City.

—Alexander v. City of Duluth, 445.

Laws 1899, c. 40, Unconstitutional Special Legislation.

—State ex rel. v. Johnson, 453.

Laws 1895, c. 175—Fire Insurance—Minnesota Standard Policy—Vacancy—Increase of Risk.

—Doten v. Aetna Insurance Co., 474.

Laws 1899, c. 225—Commission Merchants Selling Farm Produce—License.

—State ex rel. v. Wagener, 483.

Laws 1887, c. 6,—Intoxicating Liquor—No Repeal of Charter and Ordinance of Minneapolis.

—State v. Lindquist, 540.

See Cross-Examination, 198, and Table of Statutes on page xvi.

STATUTE OF LIMITATIONS.

Action upon Assessment in Mutual Insurance Company.

—Langworthy v. C. C. Washburn Flouring Mills Co., 256.

City of St. Paul—Sale for Nonpayment of Local Assessment—Action to Test Validity of Sale—Sp. Laws 1889, c. 32, § 50, Is Statute of Limitations.

—London & Northwest American Mortgage Co v. Gibson, 394.

STEAM BOILER.

See Inspector of Steam Boilers, 355.

STIPULATION.

Amendment of Record by Stipulation.

—Selsor Bros. Co. v. Minneapolis Cold-Storage Co., 186.

STOCK AND STOCKHOLDERS.

Limitation of Stockholders in Corporation to Specified Nationality—
Insolvency—Other Stockholders Estopped from Denying Liability
to Creditors of Corporation.

—Blieu v. Rand, 110.

Insolvent Corporation—Bonds Guaranteed by Individual Stockholders
—Other Stockholders Liable under G. S. 1894, c. 76, before Recourse
to Personal Guaranty.

—Winthrop National Bank v. Minneapolis T. E. Co., 329.

Gift of Certificates of Stock—Fact of Delivery.

—Richardson v. Colburn, 412.

STREET.

Right of Way of Fire Apparatus Going to Fire.

—Warren v. Mendenhall, 145.

STREET RAILWAY.

Joint Operation of Street Railway Line between Cities by Separate
Corporations—Personal Injury—Both Companies Liable—Evidence
of Plaintiff Improbable.

—Messenger v. St. Paul City Ry. Co., 34.

Collision with Fire Apparatus Going to Fire—Negligence of Motor-
man.

—Warren v. Mendenhall, 145.

Contributory Negligence—Riding Bicycle between Car Tracks—Wilful
Negligence of Motorman.

—Gagne v. Minneapolis Street Ry. Co., 171.

Personal Injury—Starting Car when Passenger Prepared to Alight—
Salko v. St. Paul City Ry. Co. Distinguished.

—Currie v. Mendenhall, 179.

Personal Injury—Difference in Evidence Given upon First and
Second Trials—Asking Opinion of Witness Based upon Circum-
stances Observed by Him—Rules Governing Use of Street by Cars—
Employment of Motorman after Accident.

—Fonda v. St. Paul City Ry. Co., 336.

Personal Injury—Negligence of Defendant in Permitting Overcrowd-
ing of Car Platform—Admission of Conversation between Con-
ductor and Another Passenger Error—Res Gestæ—Admission Made
by Claim Agent.

—Reem v. St. Paul City Ry. Co., 503.

SUBROGATION.

See Mortgage, 48.

SUMMONS.

Service of Summons upon Wrong Person of Similar Name—Vacating
Judgment upon Default.

—Ueland v. Johnson, 543.

SUPPLEMENTARY PROCEEDINGS.

Declarations of Husband or Wife in Supplementary Proceedings not Admissible in Another Action.

—National German American Bank v. Lawrence, 282.

TAXES.

Situs for Assessment of Certificate of Deposit Representing Unpaid Dividend—Failure of Trustee to List Certificate—Failure to Apply to State Auditor under G. S. 1894, § 1522, to Determine Place of Assessment—Waiver of Right to Have Trustee's Personal Debts Deducted from Share of Certificate Owned by Him—Judgment Properly Entered against Trustee.

—State v. Willard, 190.

Assessment for Water Tax by Frontage—Allowance for Streets when Platted—Constitutionality of Law not Certified.

—State v. Robert P. Lewis Co., 317.

City of St. Paul—Sale for Unpaid Local Assessment—Recovery of Amount Paid to City—Description as Bazille & Roberts Addition.

—Merchants' Realty Co. v. City of St. Paul, 343.

Tax upon Railroad Land Grant—Exemption For Five Years—Gross-Earnings Tax—Laws 1873, c. 111, and Sp. Laws 1875, c. 54, Unconstitutional so far as Repugnant to Const. art. 4, § 32a—Laws 1895, c. 168, Constitutional—State v. Stearns Followed.

—State v. Duluth & Iron Range R. Co., 433.

Laws 1899, c. 40, Unconstitutional—Additional Tax for Schools in Cities of 50,000 Inhabitants.

—State ex rel. v. Johnson, 453.

Tax Certificate under Laws 1881, c. 135—Failure to Give Highest Bid for Each Lot.

—Davis v. Carlin, 472.

See Redemption, 8, 88.

TENANT IN COMMON.

Conveyance of Whole Estate in Fee by One Tenant in Common, Record of Deed, and Entry into Exclusive Possession by Grantee, Equivalent to Disseisin of Other Tenants in Common.

—Hanson v. Ingwaldson, 533.

TIME CHECK.

See Criminal Law, 296.

TITLE.

Levy by Sheriff—Affidavit of Title by Claimant under G. S. 1894, § 5296, Sufficient.

—Schneider v. Anderson, 124.

See Estoppel, 12.

TRESPASS.

- Removal of Fence from Alleged Right of Way over Plaintiff's Land—Construction of Deed Granting Easement—Damages.
—Lidgerding v. Zignego, 421.

TRUST.

- Trustee under Administrator's Deed Estopped from Denying Title of Cestui que Trust—Demurrer.
—Sterling v. Sterling, 12.
- Situs for Taxation of Certificate of Deposit Held by Trustee—Trustee Beneficial Owner—Deduction for Personal Debts—Judgment against Trustee.
—State v. Willard, 190.
- Action by Judgment Creditor of Husband to Enforce Resulting Trust against Land of Wife.
—National German American Bank v. Lawrence, 282.

ULTRA VIRES.

- Mutual Fire Insurance Company Authorized to Insure Dwellings "and Other Property"—Authority to Insure Flour Mill.
—Langworthy v. C. C. Washburn Flouring Mills Co., 256.

UNITED STATES MAIL.

- See Contract, 349.

USURY.

- See Building and Loan Association, 97.

VALUE.

- See Books, 31.

VENDOR AND PURCHASER.

- Rescission of Sale of Real Estate because of Fraud—Waiver by Delay—Ratification.
—McQueen v. Burhans, 382.

VENUE.

- See Change of Venue, 302.

VERDICT.

- Verdict Excessive for Services Rendered and not Sustained by Evidence.
—See Forster v. Columbia National Bank, 119.
- Action by Creditor of Husband to Enforce Resulting Trust against Wife's Land—Verdict Sustained by Evidence.
—National German American Bank v. Lawrence, 282.
- Submission of Special Questions to Jury—Answers to Some, Failure to Answer Others.
—Wellendorf v. Tesch, 512.
- See Personal Injury, 34.

WAIVER.

Fire Insurance Policy—Waiver of Right to Appraisal of Loss by Refusal to Arbitrate.

—Schrepfer v. Rockford Insurance Co., 291.

See Vendor and Purchaser, 382.

WAREHOUSE.

Laws 1895, c. 148, Requires Operator of Private Warehouse for Storing Its Own Grain to Be Licensed.

—State ex rel. v. W. W. Cargill Co., 223.

WARRANTY.

Breach of Warranty in Sale of Threshing-Machine Engine—Damages.

—Aultman Co. v. Mosloski, 27.

See Insurance (Fire), 31.

WATER.

Assessment for Water Tax—Constitutionality of Law Permitting Tax by Frontage not Certified.

—State v. Robert P. Lewis Co., 317.

WAY.

Right of Way to Cross Land—Omission of Words of Inheritance from Deed—Easement not a Revocable License.

—Lidgerding v. Zignego, 421.

WINONA (CITY OF).

See Municipal Corporation, 57.

WITNESS.

Defects in Steam Engine—Competency of a Farmer to Prove Defects.

—Aultman Co. v. Mosloski, 27.

G. S. 1894, § 5602—Examination of Husband or Wife without Consent of Other Spouse—Declarations of Spouse in Supplementary Proceedings—G. S. 1894, § 5659, Does not Affect Section 5662.

—National German American Bank v. Lawrence, 282.

Personal Injury—Stopping Street Car—Asking Opinion of Witness Based upon Circumstances Observed by Him.

—Fonda v. St. Paul City Ry. Co., 336.

Excessive Use of Intoxicating Liquor—Cross-Examination—Conviction for Drunkenness—G. S. 1894, § 5658.

—Harding v. Great Northern Ry. Co., 417.

See Charge to Jury, 245; Cross-Examination, 198.

WORDS AND PHRASES.

Dwellings "and Other Property."

—See Insurance (Fire), 256.

WORDS AND PHRASES—Continued.

"Labor and" Material.

—See Mechanic's Lien, 514.

"Subject to Investigation."

—See Insurance (Fidelity), 24.

"With Intent to Defraud."

—See Criminal Law, 296.



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